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WILCOX & CO

No. 7394

United States Circuit Court of Appeals

For the Ninth Circuit.

ALBERT Z. EDDY, ALBERT P. EDDY, RAYMOND E. EDDY and GLADYS KANE,

Appellants,

vs.

NATIONAL UNION INDEMNITY COMPANY, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco.

No. 7394

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index Page

Index Page

Index Page

Index Page

Index

NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 19322-K

ALBERT Z. EDDY, ALBERT P. EDDY RAYMOND E. EDDY, and GLADYS KANE,
Plaintiffs,

v.

NATIONAL UNION INDEMNITY COMPANY, a corporation,
Defendant.

COMPLAINT UPON INSURANCE POLICY

Plaintiffs complain of defendant and for cause of action against defendant allege the following facts:

I.

Mary Elizabeth Eddy died intestate in the City and County of San Francisco, State of California, on the 23rd day of June, 1931, being at the time of her death a resident thereof and leaving estate therein.

Mary Elizabeth Eddy was married at the time of her death and left her surviving as her only heirs at law plaintiffs Albert Z. Eddy her husband; Gladys Kane, her daughter; Albert P. Eddy, her son, and Raymond E. Eddy, her son. All of the heirs mentioned herein were on the 22nd day of June, 1931, over the age of twenty-one years.

II.

At all of the times herein mentioned, defendant was, ever since has been and now is a corporation, organized and existing under and by virtue of the laws of the State of [1*] Pennsylvania, with its principal place of business in the City of Pittsburgh in said state, and was at all of the times herein mentioned, and now is engaged, among other activities, in issuing automobile indemnity insurance in favor of owners and operators of automobiles in the State of California and elsewhere.

III.

On the 22nd day of June, 1931, and at all of the times herein mentioned one, Fred R. Carfagni, was the owner of a certain Lincoln automobile.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

On or about the 13th day of May, 1931, said defendant issued to said Fred R. Carfagni its certain policy of automobile public liability insurance No. 627,670, wherein and whereby said defendant agreed to insure said Fred R. Carfagni against liability arising from any legal liability of said Fred R. Carfagni to others for bodily injury accidentally sustained, including death at any time resulting therefrom, on account of any accident due to the ownership, maintenance or use of said automobile.

Said policy of automobile public liability insurance issued as aforesaid by defendant to said Fred R. Carfagni was in full force and effect on the 22nd day of June, 1931.

IV.

Said policy of automobile public liability insurance further provided that defendant's limit of liability on account of one person injured or killed should be $15,000.00, together with court costs and interest, and, subject to the same limit for each person, that said defendant's total liability on account of any one accident so injuring or killing more than one person should be $30,000, together with court costs and interest. [2]

V.

Said policy of automobile public liability insurance further provided that defendant is bound to the extent of its liability under said policy to pay and satisfy and protect said Fred R. Carfagni against the levy of execution upon any final judg-

ment that may be recovered upon any claim covered by said policy as in the policy set forth and limited, and that an action may be maintained upon such judgment by the injured person or persons or such other party or parties in whom the right of action vests, to enforce such liability of defendant as in the policy set forth and limited.

VI.

On the 22d day of June, 1931, said Fred R. Carfagni so negligently and carelessly operated said automobile into and across the intersection of Lake Street and Park Presidio Drive in the City and County of San Francisco, State of California, as to cause said Lincoln automobile to violently collide with an automobile in which Mary Elizabeth Eddy was riding as a guest of Albert Z. Eddy, the operator of said last mentioned automobile, and as a result of said collision by the aforementioned automobiles, and of such carelessness and negligence upon the part of said Fred R. Carfagni in the operation of said Lincoln automobile, and Mary Elizabeth Eddy suffered bodily injuries by reason of which she thereafter and on the 23d day of June, 1931, died.

VII.

Thereafter Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy, and Gladys Kane, the only heirs at law surviving said Mary Elizabeth Eddy, deceased, as aforesaid, commenced and prosecuted an action in the Superior Court of the State of California,

in and for the City and County of San Francisco, against said Fred R. Carfagni to recover damages suffered by [3] said Albert Z. Eddy, the husband of Mary Elizabeth Eddy, deceased, and by Albert P. Eddy, Raymond E. Eddy, and Gladys Kane, the children of said Mary Elizabeth Eddy, deceased, as a result of her death, which said action was numbered 229,113 in the records of said court. Said action was thereafter regularly tried and resulted in a judgment being rendered on the 2d day of June, 1932, in favor of said heirs at law of said Mary Elizabeth Eddy, deceased, and against Fred R. Carfagni in the sum of $15,900, together with taxed court costs in the sum of $147.90. Said judgment was entered and docketed in the office of the Clerk of the above entitled Court on the 3d day of June, 1932, and said judgment ever since has been and now is wholly unsatisfied and unpaid. No appeal has been taken from said judgment, and the same has become and is final.

VIII.

On the 22d day of June, 1931 and at all times since said date, said Fred R. Carfagni was and is insolvent and unable to pay said judgment or any part thereof.

On the 11th day of August, 1932, said Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, the above named plaintiffs, as sole heirs at law of said Elizabeth Eddy, deceased, caused a writ of execution to be issued by the Clerk of the above entitled court in said action, in which said judg-

ment was rendered in their favor and against said Fred R. Carfagni, as aforesaid, said writ of execution being directed against the property of said Fred R. Carfagni for the purpose of satisfying said judgment against him. Thereafter and on said 11th day of August, 1932, the above named plaintiffs placed said writ of execution in the hands of the Sheriff of the City and County of San Francisco, State of California, with instructions to levy the same upon and against all property of said Fred R. Carfagni for the [4] purpose of satisfying said judgment. Thereafter, and on or about the 1st day of September, 1932, said Sheriff, because of the insolvency of said Fred R. Carfagni, returned said writ of execution to the clerk of the above entitled court wholly unsatisfied.

IX.

By reason of the foregoing facts, there is now due, owing and unpaid from said defendant to said plaintiffs the sum of $15,147.90, together with interest on said sum from June 3rd, 1932, at the rate of 7% per annum, no part of which has been paid.

WHEREFORE, plaintiffs pray judgment against defendant for the sum of $15,147.90, with interest on said sum from June 3rd, 1932, at the rate of 7% per annum, and for costs of suit.

Dated: September 7th, 1932.

SULLIVAN, ROCHE, JOHNSON & BARRY

Attorneys for Plaintiffs. [5]

State of California,
City and County of San Francisco.—ss.

ALBERT Z. EDDY, being first duly sworn, deposes and says:

That he is one of the plaintiffs named in the foregoing Complaint upon Insurance Policy; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters that he believes it to be true.

A. Z. EDDY

Subscribed and sworn to before me this 7th day of September, 1932.

[Seal] GEO. A. STOCKFLETH

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sep 17 1932. [6]

[Title of Court and Cause.]

SUMMONS.

The President of the United States of America
To National Union Indemnity Company, a corporation, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR AND ANSWER the Complaint in an action entitled as above, brought against you in the District Court of the United States in and for Northern District of California, Southern Division, within ten days after the service on you of this Summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract or.....will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable FRANK H. KERRIGAN, Judge of said District Court, this 17th day of September in the year of our Lord one thousand nine hundred and thirty-two and of our independence the one hundred and fifty-seventh.

[Seal] WALTER B. MALING
Clerk.
By B. E. O'HARA,
Deputy Clerk. [7]

United States Marshal's Office
Northern District of California

I HEREBY CERTIFY that I received the within writ on the 21st day of Sept. 1932, and personally

served the same on the 21st day of Sept., 1932, upon National Union Indemnity Co. by delivering to, and leaving with John P. Breeden, Manager said defendant named therein personally, at the City and County of S. F. in said District a copy thereof, together with a copy of the Complaint, to by..... attached thereto.

FRED L. ESOLA
U. S. Marshal
By Harold Friedenberg
Office Deputy.

San Francisco, Sept. 22, 1932.

[Endorsed]: Filed Sep. 22, 1932.

[Title of Court and Cause.]

ANSWER AND WAIVER OF JURY TRIAL.

Defendant, for its answer to the complaint in the above entitled action, admits, denies and alleges as follows:

I.

Defendant has no information or belief sufficient to enable it to answer any of the allegations contained in paragraphs I, VI, VII and VIII of said complaint and, basing its denial thereof upon that ground, defendant denies generally and specifically each and every allegation contained in said paragraphs I, VI, VII and VIII of said complaint.

II.

Defendant has no information or belief sufficient to enable it to answer any of the following allegations contained in paragraph III of said complaint and, basing its denial thereof upon that ground, defendant denies each and every one of the following allegations:

> "On the 22nd day of June, 1931, and at all of the times herein mentioned one, Fred R. Carfagni, was the owner of a certain Lincoln automobile."

Defendant denies generally and specifically each and every part of the following allegations contained in paragraph III of said complaint:

> "On or about the 13th day of May, 1931, said defendant issued to said Fred R. Carfagni its certain policy of automobile public liability insurance No. 627,670, wherein and whereby said defendant agreed to insure said Fred R. Carfagni against liability arising from any legal liability of said Fred R. Carfagni to others for bodily injury accidentally sustained, including death at any time resulting therefrom, on account of any accident due to the ownership, maintenance or use of said automobile.
>
> Said policy of automobile public liability insurance issued as aforesaid by defendant to said Fred R. Carfagni was in full force and effect on the 22nd day of June, 1931." [8]

In this connection, defendant alleges that upon the statement that no company had ever cancelled any kind of automobile insurance for said Fred R. Carfagni it did issue its insurance policy No. 627,-670 to said Fred R. Carfagni, but denies that by said insurance policy, or otherwise, it agreed to "insure said Fred R. Carfagni against liability arising from any legal liability of said Fred R. Carfagni to others for bodily injury"; and, in this connection, alleges that said policy provided that said defendant would insure the said Fred R. Carfagni "against loss and/or expense resulting from claims upon the assured for damages on account of bodily injuries, including death."

III.

For its answer to paragraph IV of said complaint, defendant admits that the limit of its liability, as stated in said policy of insurance, was $15,000, on account of one person injured or killed, together with court costs and interest upon a judgment, and that its limit on account of any one accident injuring or killing more than one person was stated to be $30,000., but denies that it thereby assumed any liability to plaintiffs, or any of them, and denies that no company had ever cancelled any kind of automobile insurance for the said Fred R. Carfagni during the three years prior to the issuance of said policy.

IV.

For its answer to paragraph V of said complaint, defendant alleges that no liability ever arose under

said policy by reason of the falsity and breach of the warranty mentioned in the preceding paragraph.

V.

Defendant denies generally and specifically each and every allegation contained in paragraph IX of said [9] complaint, and denies that there is now due or owing or unpaid from defendant to plaintiffs, or to any of them, the sum of $15,147.90, or any other sum whatsoever.

VI.

AS AND FOR A FURTHER AND SEPARATE DEFENSE, DEFENDANT ALLEGES THE FOLLOWING FACTS: That the policy of insurance issued by this defendant to said Fred R. Carfagni on or about May 13, 1931, as alleged in said complaint, was issued, as stated in said policy, "in consideration of the premium herein, the Schedule of Declarations and compliance with the provisions hereinafter mentioned"; that subdivision J of the provisions of said policy provided as follows:

> "J. Declarations. The several statements in the declarations are hereby made a part of this policy and are warranted by the assured to be true.";

that statement numbered 9 in said Schedule of Declarations of said policy of insurance so issued to said Fred R. Carfagni was as follows:

> "9. No company has cancelled or refused to issue any kind of automobile insurance for the

assured during the past three years, except as follows: NO EXCEPTIONS."

The said statement, as defendant is informed and believes and therefore alleges, was untrue in that The Home Accident Insurance Company issued an automobile insurance policy to said Fred R. Carfagni on or about July 27, 1928 and cancelled it on or about August 15, 1928 and that American Indemnity Company issued an automobile insurance policy to said Fred R. Carfagni on or about October 5, 1928 and cancelled it on or about June 11, 1929; that defendant is further informed and believes and therefore alleges that American Automobile Insurance Company and Security Insurance Company of California had, each, cancelled an automobile insurance policy issued to said Fred R. Carfagni prior to [10] May 13, 1931 but that defendant has not yet been able to ascertain the dates of said cancellations; that defendant is informed and believes and therefore alleges that each and all of said insurance policies were cancelled by said insurance companies because said Fred R. Carfagni had had numerous automobile accidents and was considered by said insurance companies to be an extremely bad risk.

That by reason of said false warranty contained in said statement 9 of said Schedule of Declarations, the said policy was void from its date of issuance and said policy never attached to any of the risks therein mentioned.

VII.

AS AND FOR A FURTHER AND SEPARATE DEFENSE, DEFENDANT ALLEGES that said Fred R. Carfagni in procuring and accepting said policy of insurance from defendant represented and warranted to defendant that no company had cancelled any kind of automobile insurance for him, as is more particularly set forth in the preceding paragraph of this answer, the allegations of which are hereby referred to and made a part of this separate defense; that, as defendant is informed and believes and therefore alleges, said warranty was false and known to said Fred R. Carfagni to be false at the time he procured and accepted said policy of insurance; that on or about June 30, 1931, defendant learned of the falsity of said warranty and forthwith advised said Fred R. Carfagni that said policy was void from its inception and that it would accept no liability under it, and tendered and offered to restore to said Fred R. Carfagni the full amount of the preium upon said policy.

WHEREFORE, defendant prays that plaintiffs take nothing by their complaint herein, and that defendant have [11] judgment for its costs of suit herein incurred.

A. E. COOLEY
LOUIS V. CROWLEY
FREDERIC E. SUPPLE
Attorneys for Defendant.

Defendant hereby waives a trial by jury of the above-entitled action.

A. E. COOLEY
LOUIS V. CROWLEY
FREDERIC E. SUPPLE
Attorneys for Defendant.

State of California,
City and County of San Francisco—ss.

JOHN P. BREEDEN, being first duly sworn, deposes and says:

That he is an officer, to-wit, Manager of Pacific Coast Department, of National Union Indemnity Company, the defendant herein, and, as such officer, makes this verification for and on its behalf; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things which are therein stated on information and belief, and, as to such matters and things, that he believes the same to be true.

JOHN P. BREEDEN

Subscribed and sworn to before me this 9th day of November, 1932.

[Seal] DOROTHY H. McLENNAN
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within Answer and Waiver of Jury Trial is hereby admitted this 10th day of November, 1932.

SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for Plaintiffs.

[Endorsed]: Filed Nov 10 1932 [12]

[Title of Court and Cause.]

MEMORANDUM AND ORDER FOR JUDGMENT

The evidence in this case shows that the defendant insurance corporation had knowledge of the cancellations of the policies issued to Dr. Carfagni by the Home Accident Insurance Company and the American Indemnity Company at the time it issued the policy in suit on May 13, 1931, within the period of three years before the issuance of the policy. If this case were being tried in the California State Court I should be bound to hold that issuance of the policy with the knowledge of the prior cancellations constituted a waiver of declaration No. 9 in the policy and that plaintiffs should recover. Since, however, this is a case in the Federal Court I am bound by the law as declared by the United States Supreme Court that such a warranty can only be waived by a writing executed by the proper officers of the insurance company. There is no such writing introduced in evidence in this case, and plaintiffs are not entitled to recover. Let judgment be entered for the defendant with costs. It is ordered that findings of fact and conclusions of law be presented by the attorney for the defendant embodying the views herein expressed. In accordance with a request from the Circuit Court of Appeals of this Ninth Circuit, it is ordered that the findings of fact be in narrative form.

Dated this 1st day of March, 1933.

KERRIGAN
U. S. District Judge.

[Endorsed]: Filed March 1st 1933. [13]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause came on regularly for trial on the 10th day of February, 1933, before Honorable Frank H. Kerrigan, Judge presiding, the Court, sitting without a jury, a jury having been expressly waived by written stipulation between the parties, filed with the Clerk before trial and introduced in evidence at said trial, and a request for special findings by the Court having been made by both plaintiffs and the defendant and granted by said Court; the plaintiffs were represented by Edward I. Barry, Esq., of the firm of Sullivan, Roche, Johnson & Barry, and the defendant was represented by Frederic E. Supple, Esq., of the firm of Cooley, Crowley & Supple.

Thereupon, the above entitled cause proceeded to trial, and evidence, oral and documentary, was introduced and the trial of said action was held on February 10th, 17th and 23rd, being duly and regularly continued from day to day during said period. Thereupon, the evidence being closed, and both plaintiffs and defendant having each moved the court for judgment in their favor respectively, upon the ground that the evidence was and is sufficient to justify and support a judgment only in their favor respectively and was and is insufficient to justify or support a judgment for the other, and the cause having been submitted on written briefs and argu-

ment, and the Court having duly considered the foregoing, and being fully advised in the premises, makes and files its written Findings of Fact and Conclusions of Law, as follows: [14]

FINDINGS OF FACT.

I.

The Court finds that it is true that Fred R. Carfagni was the owner of a certain Lincoln Sedan automobile from October 5, 1928 to June 22, 1931 and thereafter; that on June 22, 1931 said Fred R. Carfagni while operating said automobile had an automobile accident in San Francisco, California, as a result of which Mary Elizabeth Eddy died; and that thereafter Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy, and Gladys Kane, as the only heirs at law surviving Mary Elizabeth Eddy, prosecuted an action against Fred R. Carfagni in the Superior Court of the City and County of San Francisco for the death of Mary Elizabeth Eddy, resulting in a judgment in favor of said heirs and against Fred R. Carfagni in the sum of Fifteen Thousand Nine Hundred ($15,900.00) Dollars, together with costs in the sum of One Hundred Forty-seven and 90/100 ($147.90) Dollars, which said judgment has since become final and execution thereon has been returned by the Sheriff of the City and County of San Francisco wholly unsatisfied, prior to the commencement of the above entitled action.

II.

The Court finds that it is true that on or about May 13, 1931 the defendant insurance company, a corporation of Pittsburg, Pennsylvania, doing business in California, issued and delivered to Fred R. Carfagni its certain policy of automobile public liability insurance No. 627,670, wherein and whereby said defendant agreed to insure Fred R. Carfagni against loss and expense resulting from claims upon the assured for damages on account of bodily injuries, including death, resulting from the ownership and/or operation of said Lincoln Sedan automobile; that the term of said policy of insurance [15] was from June 1, 1931 to June 1, 1932; that said policy provided that defendant's limit of liability on account of one person injured or killed should be Fifteen Thousand ($15,000.00) Dollars, together with court costs and interest on a judgment; that the said policy of insurance issued and delivered by the defendant insurance company to said Fred R. Carfagni on or about May 13, 1931, contained a provision to the effect that said policy was issued, as stated in said policy,

> "in consideration of the premium herein, the Schedule of Declarations and compliance with the provisions hereinafter mentioned;"

that subdivision J of the provisions of said policy provided as follows:

> "J. Declarations. The several statements in the declarations are hereby made a part of this

policy and are warranted by the assured to be true."

That statement numbered 9 in said Schedule of Declarations of said policy of insurance so issued to said Fred R. Carfagni was as follows:

"9. No company has cancelled or refused to issue any kind of automobile insurance for the assured during the past three years, except as follows: NO EXCEPTIONS."

III.

The Court further finds that said statement numbered 8 in said Schedule of Declarations was untrue and that said statement numbered 9 in said Schedule of Declarations was a material warranty; that said material warranty was breached in that the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas, within the period of three years preceding the issuance and delivery to said Fred R. Carfagni of the said policy of the defendant of May 13, 1931, cancelled as a bad risk, on or about August 11, 1928, an automobile insurance policy it had previously issued and delivered to [16] said Fred R. Carfagni on July 27, 1928; and the Travelers Insurance Company, within the three year period prior to the issuance of said policy of the defendant, cancelled, as an undesirable risk, on or about September 15, 1928, an automobile insurance policy it had previously issued to Fred R. Carfagni; and the Washington Underwriters Company, within the three year perior prior to the issuance of the said

policy of the defendant, on or about October 5, 1928, cancelled, as an undesirable risk, the policy of automobile insurance it had previously issued to Fred R. Carfagni on or about September 5, 1928; and the Western States Insurance Company, within the three year period prior to the issuance of said policy of the defendant, on or about June 1, 1929, cancelled, as an undesirable risk, the policy of automobile insurance it had previously issued to Fred R. Carfagni; that prior to May 13, 1931 and on or before June 1, 1929, Fred R. Carfagni, in procuring the first policy of automobile insurance, by and through his agent, falsely represented to the defendant that there had been no losses or cancellations of automobile insurance by any other company and that it was in order for the said defendant to write said first policy of automobile insurance; that said representation was believed to be true and was relied upon by the said defendant; that the said automobile insurance policy of the defendant, issued and delivered to Fred R. Carfagni on or about May 13, 1931, was renewed and based upon the information and statements contained in the first automobile insurance policy issued and delivered by the defendant to Fred R. Carfagni on or about June 1, 1929.

IV.

The Court finds that it is true that at the time the defendant issued and delivered its policy of automobile insurance on or about May 13, 1931 to Fred R. Carfagni, it [17] had knowledge of the cancella-

tion of the policy issued to the said Fred R. Carfagni by the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas within the three year period prior to the issuance of said automobile insurance policy; that the defendant likewise had knowledge of the cancellation of a policy of the Pacific Employers Insurance Company within said three year period, but said policy was not an automobile insurance policy; that the defendant did not have any knowledge concerning the details or the particular reasons which caused the said automobile insurance companies to cancel out the policies of said Fred R. Carfagni; the Court further finds that the defendant did not have any knowledge at the time it issued and delivered its policy of automobile insurance of May 13, 1931 to Fred R. Carfagni concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Travelers Insurance Company on or about September 15, 1928; that the defendant did not have any knowledge concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Washington Underwriters Company on or about October 5, 1928; that the defendant did not have any knowledge concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Western States Insurance Company on or about June 1, 1929; that the aforesaid cancellations made upon the ground of the undesirability of the risk, by the Travelers Insurance Company, Washington Underwriters Company and Western States In-

surance Company and without the knowledge of the defendant were all made within said three year period prior to May 13, 1931.

The Court further finds that that certain policy of automobile public liability insurance No. 627670, issued and delivered to Fred R. Carfagni on or about the 13th day of May, 1931, and the automobile insurance policy of the defendant [18] here in suit, contained a provision that,

> "I. Waiver. No provision or condition of this policy shall be waived or altered, except by written endorsement attached hereto and signed by the president or secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the company unless such person, firm or corporation is authorized in writing as such agent by the president or secretary."

The Court further finds that no warranty, provision or condition of said automobile public liability insurance No. 627670 and issued on or about May 13, 1931, was ever waived or altered and that there was not, nor is there, any writing of any character or written endorsement of any character or description executed by defendant or attached to the said policy of the said defendant and signed by the president or secretary, waiving or changing any of the warranties, provisions or conditions of said automobile public liability insurance policy No. 627670.

V.

The Court further finds that by reason of said material warranty contained in said statement No. 9 of said Schedule of Declarations and by reason of the falsity and breach of said material warranty, the said policy of automobile insurance No. 627670 became and was void from its date of issuance and said policy never attached to any of the risks therein mentioned. The Court further finds that on or about June 30, 1931 the said defendant advised the said Fred R. Carfagni that said policy was void from its inception and that it would accept no liability thereunder and tendered and offered to restore to said Fred R. Carfagni the full amount of the premium paid upon said policy; that neither at the time said tender was made, nor at any other time, did said [19] Fred R. Carfagni ever specify or state any objections to the mode, kind, or amount thereof; that the defendant did not accept or assume at any time any liability under said automobile insurance policy issued and delivered to said Fred R. Carfagni on or about May 13, 1931.

CONCLUSIONS OF LAW:

From the foregoing facts, the Court finds:

I.

That the defendant is entitled to a judgment against the plaintiffs for its costs of suit incurred herein.

II.

That the plaintiffs take nothing by their complaint.

Let judgment be entered accordingly.

Done in open Court this 22nd day of June, 1933.

FRANK H. KERRIGAN
United States District Judge.

[Endorsed]: Filed Jun 22 1933 [20]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,322-K

ALBERT Z. EDDY, et al.,

Plaintiffs,

vs.

NATIONAL UNION INDEMNITY COMPANY, a corporation,

Defendant.

JUDGMENT.

The above entitled cause came on regularly for trial on the 10th day of February, 1933, before Honorable Frank H. Kerrigan, Judge presiding, the Court, sitting without a jury, a jury having been expressly waived by written stipulation between the parties, filed with the Clerk before trial and introduced in evidence at said trial, and a request for

special findings by the Court having been made by both plaintiffs and the defendant and granted by said Court; the plaintiffs were represented by Edward I. Barry, Esq., of the firm of Sullivan, Roche, Johnson & Barry, and the defendant was represented by Frederic E. Supple, Esq., of the firm of Cooley, Crowley & Supple.

Thereupon, the above entitled cause proceeded to trial, and evidence, oral and documentary, was introduced and the trial of said action was held on February 10th, 17th and 23rd, being duly and regularly continued from day to day during said period. Thereupon the evidence being closed, and both plaintiffs and defendant having each moved the court for judgment in their favor respectively, upon the ground that the evidence was and is sufficient to justify and support a judgment only in their favor respectively and was and is insufficient to justify or support a judgment for the other, and the cause having been submitted on written briefs and [21] argument, and the Court having duly considered the foregoing, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusion of law, and being fully advised:—

WHEREFORE, by reason of the law and the findings of fact aforesaid, it is ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing by their complaint, and that the defendant do have and recover of and from the plaintiffs its

costs and disbursements incurred in said action amounting to the sum of $.....

Dated: June 22nd, 1933.

WALTER B. MALING,
Clerk. [22]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED that the above entitled cause came on regularly for trial before the above entitled Court, Hon. Frank H. Kerrigan, judge therein presiding, on the 10th day of February, 1933, at the February term of said Court, and the following proceedings were had; to wit,

ALBERT Z. EDDY

one of the plaintiffs, called as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

My name is Albert Z. Eddy. I reside at 1514 Waller Street. I am one of the plaintiffs in this case against the National Union Indemnity Company, and the other defendants are Albert P. Eddy and Raymond E. Eddy, my sons, and Gladys Kane, my daughter. Mary Elizabeth Eddy was my wife. She died in the Emergency Hospital in San Francisco on June 22, 1931. Her death resulted from an automobile accident. Some time after that accident, an action was brought by me and the other plaintiffs named in this action against Dr. Fred R. Carfagni. No part of the judgment rendered in that action has been paid to me, and the entire judgment remains unsatisfied. [23]

E. H. PAYNE

called as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

Direct Examination

I reside in San Francisco. I am an insurance broker and have been in the insurance brokerage business for twenty-seven years. I have known Dr. Fred R. Carfagni for twelve years. The policy now shown to me, purporting to be a combination automobile policy, issued by National Union Fire Insurance Company and National Union Indemnity Company of Pittsburgh, Pennsylvania to Fred R. Carfagni, I have seen before. That policy was formerly in my possession. I received it on behalf of Dr. Fred R. Carfagni from the National Union. Dr. Fred R. Carfagni is the same Dr. Carfagni referred to in the policy. This policy is a renewal of a policy that was issued before in the same combination of companies, and for the same insurance. The number of that previous policy is referred to in this particular policy. In fact, this is a third renewal of the same policy. I had applied for this policy on behalf of Dr. Carfagni. They issued an expiration notice, after which I asked them to renew the policy.

Mr. BARRY: I offer the policy in evidence at this time, may it please your Honor, and ask that it be marked Plaintiff's Exhibit 1. Just generally referring to the policy, the policy is what is known as a combination automobile policy, issued by the

(Testimony of E. H. Payne.)

two companies already referred to. The policy period is June 1, 1931 to June 1, 1932. The automobile referred to in the policy is a Lincoln sedan automobile, and the premium referred to in the policy is $176.82. The policy refers to a former policy No. 619666, Folio 5513. The limits provided for in the policy are, using the term that is ordinarily used in insurance, $15,000 and $30,000.

(The policy was thereupon received in evidence and [24] marked "Plaintiffs' Exhibit 1")

PLAINTIFFS' EXHIBIT NO. 1

Form CFI-1 Policy No. 627670

Combination Automobile Policy

National Union Fire Insurance Company
and
National Union Indemnity Company
Pittsburgh, Pa.

Schedule of declarations applying to policy of each company

1. Name of Assured—Fred R. Carfagni.
2. Address of Assured—580 Green Street, San Francisco, California.
3. Assured is—(Individual, Co-partnership, Corporation or Estate)—Individual.
4. Assured's occupation or business is—(State in Full)—Dentist—Employed by .....

5. This Policy shall be in effect for a period of Twelve Months from 12 o'clock noon, standard time at assured's address June 1, 1931 to 12 o'clock noon, standard time at assured's address June 1, 1932.
6. The following is the description of the Automobile and the facts with respect to purchase of same:

   Model, Year, 1929. Model, No. or Letter..... Trade Name, Lincoln. Type of Body (If Truck, state Tonnage), Sedan. Serial No..... Motor No. 51834. Horse Power..... No. of Cylinders, 8. List Price $.....

   Purchased by the Assured — Month, October; Year, 1928. New or Second Hand—New. Actual Cost to Assured (Including Equipment)—$5,-055.00. Is Automobile Fully Paid For? (Yes or No)—Yes. Amount Unpaid? $..... No. Unpaid Notes?..... Notes Payable Monthly (If not, state method of payment).

   Subject to all the stipulations, provisions and conditions contained in this policy, loss, if any, is payable to Assured as interest may appear. (Give name of Person, Firm or Corporation holding any Encumbrance.)
7. The above described automobile is and will be during the period of this policy, used for the following purposes: Business & Pleasure.
8. The above described automobile is and will be during the period of this policy, principally used and garaged in the city named in Declaration 2, except as follows: No exceptions.

9. No company has cancelled or refused to issue any kind of automobile insurance for the Assured during the past three years, except as follows: No exceptions.

The company shall be liable only under that section or those sections of the policy for which a specific premium charge is made below.

Amount of Insurance, $2000.00. (Insert either a Specific Amount or Words "Actual Cash Value.")

Part 1—National Union Fire Insurance Company.

Sections 1 and 2. Fire and Transportation.

Rate .20. Premium $4.00.

Section 3. Theft—Theft Clause B Applicable.

Rate .25. Premium $5.00.

Additional Premium, Broad Form Coverage.

Rate ..... Premium $.....

Section 4. Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, Accidental, and External Discharge or Leakage of Water.

Rate, Nil. Premium, $ Nil.

Section 5. Collision or Upset in excess of $ Full Cov. (insert "Full Coverage," "$50.00," or "$100.00" deductible according to coverage desired), subject to Collision peril clause on page two. Credit allowed for.....Bumpers.

Premium $87.00.

(Give name, indicating "Front," "Rear," or "Front and Rear," or insert word "None"), subject to Bumper clause on page two.

Part One, Total Premium, $96.00.

Part 2—National Union Indemnity Company.

Section 6. Liability for Bodily Injuries or Death—(a) Limit one person ($15,000.00). (b) Limit one accident ($30,000.00). Premium $69.12. Liability for Damage to property of others. (c) Limit one accident ($5,000.00). Premium $11.70.

Part Two, Total Premium, $80.82.

Total Premium Part One and Two, $176.82.

Paste Endorsements Here.

Countersigned at San Francisco, Calif., this 13th day of May, 1931.

Former Policy No. 619666; folio 5513.

G. M. ROLOSON,
Agent.

Part I.

National Union Fire Insurance Company
Pittsburg, Pa.
Hereinafter called the Company
In Consideration of the Premium Hereinafter Mentioned, Does Insure

the Assured named herein, and legal representatives, for the term herein specified, to an amount not exceeding the actual cash value of the property at the time any loss or damage occurs, against direct loss or damage from the perils specifically insured against herein to the body, chassis and its machinery and the equipment of the automobile described herein, such equipment to include only equipment usually and ordinarily carried in or at-

tached to said automobile in its usual and customary use, only while within the limits of the United States (exclusive of Alaska, the Hawaiian, Philippine and Virgin Islands, Porto Rico and Canal Zone) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits. Coverage, if any, under Sections (5) of the Perils insured against shall be as hereinafter provided.

Perils Insured Against

This policy does not cover against loss by any of the perils named in sections 1 to 5 inclusive other than such as have a specific premium inserted in the declarations.

Section (1) Fire, arising from any cause whatsoever, and Lightning.

Section (2) Transportation.

The stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or water, including general average and salvage charges for which the Assured is legally liable.

The Company's liability under this section, if any, shall not exceed the amount of insurance, named herein.

Section (3) (A) Theft, Robbery and Pilferage, excepting by any person or persons in the Assured's household, or in the Assured's service or employment, whether the theft, robbery or pilferage occurs during the hours of such service or employment

or not; and excepting loss suffered by the Assured from voluntary parting with title and/or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense or otherwise, and excepting in any cases, other than the theft of the entire automobile described herein, the theft, robbery or pilferage of (a) tools or repair equipment; and (b) other equipment or detachable parts (not excluded under the General Conditions of this Policy) where the amount of loss or damage to such other equipment or detachable parts is less than $50; each such loss or damage being deemed a separate claim. If the amount of such loss or damage exceeds $50 the sum of $50 shall be deducted from the amount of determined loss. This policy does not insure against the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession of the insured property under a mortgage, conditional sale lease or other contract or agreement, whether written or verbal.

The Company's liability under this section, if any, shall not exceed the amount of insurance, named herein.

(B) Theft, robbery or pilferage, excepting by any person or persons in the Assured's household or in the Assured's service or employment, whether the theft, robbery or pilferage occurs during the hours of such service or employment or not; and excepting loss suffered by the Assured from voluntary parting with title and/or possession, whether

or not induced so to do by any fraudulent scheme, trick, device or false pretense or otherwise; and excepting in any case, other than the theft of the entire automobile described herein, the theft, robbery or pilferage of tools and repair equipment. This policy does not insure against the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession thereof under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal. It is a condition of this policy, that in event of theft, robbery or pilferage, notice of such shall be given promptly to the police, and failure to give such notice shall invalidate any claim hereunder. The Company's liability under this section, if any, shall not exceed the amount of insurance named herein.

(C) Theft, robbery or pilferage excepting by any person or persons in the Assured's household or in the Assured's service or employment, whether the theft, robbery or pilferage occurs during the hours of such service or employment or not; and excepting loss suffered by the Assured from voluntary parting with title and/or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense or otherwise; and excepting in any case, other than the theft of the entire automobile described herein, the theft, robbery or pilferage of tools, repair equipment, motometers, extra tires and/or tubes and/or rims and/or wheels and/or extra or ornamental fittings.

This policy does not insure against the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession thereof under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal. It is a condition of this policy, that in event of theft, robbery or pilferage, notice of such shall be given promptly to the police, and failure to give such notice shall invalidate any claim hereunder. The Company's liability under this section, if any, shall not exceed the amount of insurance named herein.

Section (4) Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, Accidental, and External Discharge or Leakage of Water, excluding damage caused by rain, sleet, snow, flood, rupture of tires and explosion within the combustion chamber of an internal combustion engine. The Company's liability under this section, if any, shall not exceed the amount of insurance named herein.

Section (5) Collision. In consideration of an additional premium, if set opposite section 5 of the schedule on page one, and subject to all conditions of this policy, the perils insured against hereunder are extended to include accidental collision or upset with any other automobile, vehicle or object, where the damage from such collision or upset to the automobile or equipment herein described is in excess of the sum named under section 5 on page one, each accident being deemed a separate claim and said sum to be deducted from the amount of each

claim when determined, provided that if the words "Full Coverage" are inserted on page one and the proper premium for full coverage is set opposite, no sum shall be deducted; excepting in any case:

(1) Loss or damage to any tire, due to puncture, cut, gash, blow-out or other ordinary tire trouble; and excluding in any event loss or damage to any tire, unless caused in an accidental collision or upset, which also causes other loss or damage to the insured automobile.

(2) Loss or damage occurring while the automobile insured is engaged in any race or speed contest, or while being operated by any person under the age limit fixed by law or in any event under the age of sixteen years.

In the event of loss or damage to said automobile, whether such loss or damage is covered by this policy or not the liability of this Company against collision or upset under this policy shall be reduced by the amount of such loss or damage until repairs have been completed, but shall then attach for an amount not exceeding the actual cash value of the property, without additional premium.

The amount recoverable for accidental collision or upset under this policy shall not exceed the actual cash value of the property (less a deduction, if any, as above provided), at the time of any loss or damage, but shall not be limited by the amount of insurance named in this policy.

Warranties By the Assured. The Assured's occupation or business, Employer's name and ad-

dress, the description of the automobile insured, the facts with respect to the purchase of same, the uses to which it is and will be put, and the places where it is usually kept, as set forth and contained in this policy, are statements of facts known to and warranted by the Assured to be true, and this policy is issued by this Company relying upon the truth thereof.

This policy is made and accepted subject to the provisions, exclusions, conditions and warranties set forth herein or endorsed hereon, and upon acceptance of this policy the Assured agrees that its terms embody all agreements then existing between himself and this Company or any of its agents relating to the insurance described herein, and no officer, agent or other representative of this Company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached. It is a condition of this policy that in the event of violation by the Assured of any Agreement, condition or warranty contained in this policy or in any rider, now or hereafter attached hereto, this policy shall be void.

Bumper Allowance Clause. In consideration of the reduced Collision premium, if granted under the Collision Section 5 on page one of this policy, it is warranted by the Assured that the automobile

insured under this policy is and will be continuously equipped with bumper and/or bumpers, of the make named herein (approved by the Underwriters' Laboratories, Inc., and bearing their label). The Assured undertakes to use all diligence and care in maintaining the efficiency of said bumper and/or bumpers throughout the life of this policy.

Notice of Loss. In the event of loss or damage, the Assured shall give forthwith notice thereof in writing to this Company. Provided, however, that where such a limitation for the giving of notice of loss is prohibited by the laws of the State wherein this policy is issued, then in that event such notice shall be required to be given by the Assured within the shortest period permitted under the laws of such State.

Proof of Loss. Within sixty (60) days after loss or damage, unless such time is extended in writing by this Company, the Assured shall render a statement to this Company signed and sworn to by the Assured, stating the place, time and cause of the loss or damage, the interest of the Assured and of all others in the property, the sound value thereof and the amount of loss or damage thereon, all encumbrances thereon, and all other insurance whether valid or not covering said property; and the Assured, as often as required, shall exhibit to any person designated by this Company all that remains of the property insured and submit to examinations under oath by any person named by this Company,

and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this Company or its represenative, and shall permit extracts and copies thereof to be made.

Limitation of Liability and Method of Determining Same. This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated accordingly, with proper deduction for depreciation however caused, (and without compensation for the loss of use of the property), and shall in no event exceed what it would then cost to repair or replace the automobile or such parts thereof as may be damaged with other of like kind and quality; such ascertainment or estimate shall be made by the Assured and this Company, or if they differ, then by appraisal as hereinafter provided.

Appraisal. In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, this Company and the Assured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen, and failing for fifteen (15) days from the appointment of the second referee to agree upon such third referee then, on request of the Assured

or this Company, such referee shall be selected by the State Official having jurisdiction over insurance in the State in which the property insured was located at time of loss; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss: but no person shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months. This Company and the Assured shall each pay the referee selected by them, and the expenses of the appraisal and the third referee shall be paid by this Company and the Assured equally.

Payment of Loss. This Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall in no event become payable until sixty (60) days after the notice, ascertainment, estimate and verified proof of loss herein required have been received by this Company, and if appraisal is demanded, then, not until sixty days after an award has been made by the appraisers.

Subrogation. This Company may require from the Assured an assignment of all right of recovery against any party for loss or damage to the

extent that payment therefor is made by this Company.

Protection of Salvage. In the event of any loss or damage, whether insured against hereunder or not, the Assured shall protect the property from other or further loss or damage, and any such other or further loss or damage due directly or indirectly from the failure to protect shall not be recoverable under this policy. Any such act of the Assured or this Company or its agents in recovering, saving and preserving the property described herein, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and where the loss or damage suffered constitutes a claim under this policy, then all reasonable expenses thus incurred shall also constitute a claim under this policy, provided, however, that this Company shall not be responsible for the payment of a reward offered for the recovery of the insured property unless authorized by this Company.

Abandonment. It shall be optional with this Company to take all or any part of the property at the appraised value where appraisal is had as hereinbefore provided, but there can be no abandonment thereof to this Company; and where theft is insured against this Company shall have the right to return a stolen automobile or other property with compensation for physical damage, at any time before actual payment hereunder.

Cancellation. This policy shall be cancelled at any time at the request of the Assured, in which

case this Company shall, upon demand and surrender of this policy refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be cancelled at any time by this Company by giving to the Assured a five (5) days' written notice of cancellation with or without tender of the excess of paid premium above the pro-rata premium for the expired term, which excess if not tendered shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand. Notice of cancellation mailed to the address of the Assured stated in the policy shall be a sufficient notice. Where a special provision for cancellation and notice of such cancellation is required by statutory enactment, the requirements of the provision required by such statute shall be substituted in lieu of the foregoing provision.

Property Excluded. This Company shall not be liable for:

(a) Loss or damage to robes, wearing apparel, personal effects, or extra bodies;

War, Riot, Etc. (b) Loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, military, naval or usurped power, or by order of any civil authority.

Other Insurance. No recovery shall be had under this policy, if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss,

which would attach if this insurance had not been effected.

Noon. The word "Noon" herein means noon of standard time at the place the contract was made.

Misrepresentation and Fraud. This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Title and Ownership. This entire policy shall be void unless otherwise provided by agreement in writing added hereto;

(a) If the interest of the Assured in the subject of this insurance be or becoming other than unconditional and sole lawful ownership; or the subject of the insurance has ever been stolen or unlawfully taken prior to the issuance of this policy and not returned to the lawful owner prior to the issuance of this policy; or in case of transfer or termination of the interest of the Assured other than by death of the Assured; or in case of any change in the nature of the insurable interest of the Assured in the property described herein either by sale or otherwise; or

(b) If this policy or any part thereof shall be assigned before loss.

Encumbrance. Unless otherwise provided by agreement in writing added hereto, this Company

shall not be liable for loss or damage to any property insured hereunder.

Limitation of Use. (a) While encumbered by any lien or mortgage; or

(b) While the automobile described herein is frequently or habitually used as a public or livery conveyance for carrying passengers for compensation, and for one week after the termination of said use; or while being rented under contract or leased, or operated in any race or speed contest; and in connection with paragraph 1, section 5, Accidental collision or upset—while being operated by any person under the age limit fixed by law, or in any event, under the age of sixteen years.

Loss for Which Carrier and/or Bailee for Hire is Liable. This Company shall not be liable for loss or damage to any property insured hereunder while in the possession of a carrier and/or bailee for hire under a contract, stipulation or assignment whereby the benefit of this insurance is sought to be made available to such carrier and/or bailee. Where loss or damage occurs for which a carrier and/or bailee may be liable and which would otherwise be covered hereunder, this Company will advance to the Assured by way of loan the money equivalent of such loss or damage, which loan shall in no circumstances affect the question of this Company's liability hereunder and shall be repaid to the extent of the net amount collected by or for account of the Assured from the carrier and/or

bailee after deducting cost and expense of collection.

Suit Against Company. No suit or action on this policy or for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve (12) months next after the happening of the loss; provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

Any and all provisions of this policy which are in conflict with the statutes of the State wherein this policy is issued are understood, declared, and acknowledged by this Company to be inoperative and void.

Any and all provisions of this policy which are in conflict with the statutes of the State wherein this policy is issued are understood, declared and acknowledged by this Company to be amended to conform to such statutes.

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid until countersigned by a duly authorized Agent of the Company.

E. E. COLE,
President.

F. J. BREEN,
Secretary.

Part II.

National Union Indemnity Company
Pittsburgh, Pa.
Hereinafter called the Company

Does Hereby Agree, in consideration of the premium herein, the schedule of Declarations and compliance with the provisions hereinafter mentioned;

General Insuring Agreements

Coverage under any section provided only if a specific premium charge is made in the Declarations.

Section 6. To Insure the Assured against loss and/or expense resulting from claims upon the Assured for damages on account of

(a) Bodily Injuries, including death, at any time resulting therefrom, to any person or persons,

(b) Damage to Property, including the loss of use of such property, excluding however, property of the Assured and/or property of others in the custody of the Assured and/or any property carried in or upon any automobile described in this policy,

Accidentally Suffered or Alleged to Have Been Suffered while this policy is in force by reason of the ownership, maintenance or use within the limits of the United States of America (exclusive of Alaska, the Philippine and Hawaiian Islands and other "possessions") or Canada of any automobile described in the Declarations.

To Defend in the name and on behalf of the Assured, any suits, even if groundless, brought against the Assured to recover damages on account of such

accidents as are covered under this policy.

To Pay, irrespective of the limits of liability hereinafter mentioned, all costs taxed against the Assured in any legal proceeding defended by the Company, all interests accruing after entry of judgment and the expense incurred by the Assured for such immediate medical and surgical relief as is imperative at the time of the accident, together with all expenses incurred by the Company for investigation, adjustment and defense.

Additional Assureds. The Insurance provided by this policy is so extended as to be available, in the same manner and under the same provisions as it is available to the Named Assured, to any person or persons while riding in or legally operating any of the automobiles described in the declarations or to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant except that the extension provided for in this condition shall not be available to: (1) any public garage, automobile repair shop, automobile sales agency, automobile service station or the agents or employees thereof, (2) the purchaser, transferee or assignee of any of the automobiles described in the Declarations, except by the written consent of the Company endorsed hereon.

The unqualified term "Assured" wherever used in this policy shall include in each instance the Named Assured and any other person, firm or corporation entitled to insurance under the provisions and conditions of this policy, but the qualified term "Named Assured" shall apply only to the Assured named and described in Declaration No. 1. Any insurance under this policy shall be applied first to the protection of the Named Assured and the remainder, if any, to the protection of any other Assured.

Bankruptcy or Insolvency of Assured. The Company is bound to the extent of its liability under this policy to pay and satisfy and protect the Assured against the levy of execution upon any final judgment that may be recovered upon any claim covered by this policy as in the policy set forth and limited and an action may be maintained upon such judgment by the injured person or persons or such other party or parties in whom the right of action vests to enforce such liability of the Company as in the policy set forth and limited.

Provisions

A. Limits. Regardless of the number of Assureds involved the Company's limit of liability applied separately to each automobile described hereunder, for loss from an accident resulting in bodily injuries to or in the death of one person is limited to the sum stated in Part 2—Section 6 (a) of the Declarations; and subject to the same limit for each person the Company's total liability for loss from

any one accident resulting in bodily injuries to or in the death of more than one person is limited to the sum stated in Part 2—Section 6 (b) of the Declarations; and the Company's total liability for damage to property, including the loss of use of such property, as a result of any one accident is limited to the sum stated in Part 2—Section 6 (c) of the Declarations.

B. Exclusions. This policy does not cover (1) any obligations assumed by or imposed upon the Assured by any Workmen's Compensation agreement, plan or law, (2) injuries or death to any employee of the Assured while engaged in operating or caring for any automobile insured hereunder, (3) injuries or death to any employee of the Assured engaged in the usual course of trade, business, profession or occupation of the Assured.

And the policy does not cover while any automobile insured hereunder is being (4) used for any purpose other than specified in declaration 7, (5) driven or manipulated by any person in violation of law as to age, and if there is no legal age limit, then under the age of 16 years, (6) driven or manipulated in any race or contest, (7) used for towing or propelling any trailer or any other vehicle used as a trailer, (8) rented or hired to others or being used to carry passengers for a consideration.

C. Notice of Accidents and Settlements. The Assured shall give immediate written notice of any accident covered by this policy, and like notice of

any claim and/or suit resulting therefrom, and such notice together with every summons or other process must be forwarded to the Home Office of the Company or to its authorized representative. The Company reserves the right to settle any claim or suit. Whenever requested by the Company the Assured shall aid in effecting settlements, securing information and evidence, the attendance of witnesses, and in prosecuting appeals. The Assured shall at all times render to the Company all co-operation within his power. Except as herein elsewhere provided for, the Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceedings without the consent of the Company previously given in writing.

D. Right of Action. No action shall lie against the Company to recover for any loss under this policy, unless it shall be brought after the amount of such loss shall have been fixed or rendered certain by final judgment against the Assured after trial of the issue. In no event shall any such action lie unless brought within Twelve months after the right of action accrues as herein provided, except, however, in the event that any statutory provision provides for a definite minimum period, then the statutory minimum provision shall govern, irrespective of Provision (H) of this policy.

E. Subrogation. In case of payment of loss or expense under this policy, the Company shall be subrogated to all of the Assured's rights of recovery

to the extent of such payment and the Assured shall execute any and all papers required and shall cooperate with the Company to secure such rights.

F. Other Insurance. If the Named Assured carries other insurance covering concurrently a loss covered by this policy, he shall not recover from the Company a larger proportion of any such loss than the sum hereby insured bears to the whole amount of valid and collectible insurance applicable thereto, and if such other insurance be that of this Company the Named Assured must elect under which policy of the Company all claims arising out of such loss shall be treated and thereafter the Company shall not be liable to the Named Assured in connection with such loss under any other policy. If any Assured other than the Named Assured is covered by valid and collectible insurance against a loss covered hereby, such Assured shall have no right of recovery under this policy.

G. Cancellation. This policy may be cancelled at any time at the request of the Named Assured in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be cancelled at any time by the Company by giving the Named Assured written notice of cancellation stating when thereafter cancellation shall be effective, and the earned premium shall be adjusted pro rata which refund if not tendered with the cancellation notice shall be refunded on demand. Notice of cancellation mailed to the address of the Named Assured

stated in this policy shall be a sufficient notice. The Company's check or the check of any duly authorized representative of the Company tendered to the Named Assured in the manner hereinbefore provided for the service of cancellation notice shall be a sufficient tender of any unearned premium.

H. Statutory Provision. If any of the provisions or conditions of this policy shall conflict with or are inconsistent with the law of the State where this contract is entered into, then such provisions and conditions shall be inoperative in such State and the State law shall prevail.

I. Waiver. No provision or condition of this policy shall be waived or altered, except by written endorsement attached hereto and signed by the President or Secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the Company unless such person, firm or corporation is authorized in writing as such agent by the President or Secretary.

J. Declarations. The several statements in the declarations are hereby made a part of this policy and are warranted by the assured to be true.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by a duly authorized agent of the Company.

E. E. COLE,
President.

F. J. BREEN,
Secretary.

Combination Automobile Policy

Policy No. 627670 Folio No. 5513 I

National Union Fire Insurance Company
and
National Union Indemnity Company
Pittsburgh, Pa.

Assured—Fred R. Carfagni.
Expires—June 1, 1932.

Room 620—114 Sansome St., San Francisco
E. H. Payne—Insurance Service
Balfour Building
351 California St., San Francisco
Tel. Douglas 1410 Tel. Garfield 1070

Important—Please Read Your Policy

National Union Fire Insurance Company

Officers

E. E. Cole.....President
A. W. Mellon.....Vice President
E. W. Hall, J. F. Guinness, E. Ellsworth Cole,
L. A. Nunnink.....Second Vice Presidents
F. J. Breen.....Secretary
J. A. Daelhousen.....Asst. Secretary
W. H. Hetzel.....Asst. Secretary
Wm. Fingerhuth.....Asst. Secretary
A. W. McEldowney.....Treasurer
W. A. Strouss.....Asst. Treasurer

National Union Indemnity Company

Officers

E. E. Cole	President
R. B. Mellon	Vice President
L. A. Nunnink	Second Vice President
F. J. Breen	Secretary
A. W. McEldowney	Treasurer
W. A. Strouss	Asst. Treasurer

Short Rate Cancellation Table

1 day	2% of annual premium
2 days	4 " " "
3 "	5 " " "
4 "	6 " " "
5 "	7 " " "
6 "	8 " " "
7 "	9 " " "
8 "	9 " " "
9 "	10 " " "
10 "	10 " " "
11 "	11 " " "
12 "	12 " " "
13 "	13 " " "
14 "	13 " " "
15 "	14 " " "
16 "	14 " " "
17 "	15 " " "
18 "	16 " " "
19 "	16 " " "
20 "	17 " " "
25 "	19 " " "
30 "	20 " " "

35	days		23%	of annual	premium
40	”		26	”	”
45	”		27	”	”
50	”		28	”	”
55	”		29	”	”
60	”		30	”	”
65	”		33	”	”
70	”		36	”	”
75	”		37	”	”
80	”		38	”	”
85	”		39	”	”
90	”	or three months	40	”	”
105	”		45	”	”
120	”	or four months	50	”	”
135	”		55	”	”
150	”	or five months	60	”	”
165	”		65	”	”
180	”	or six months	70	”	”
195	”		73	”	”
210	”	or seven months	75	”	”
225	”		78	”	”
240	”	or eight months	80	”	”
255	”		83	”	”
270	”	or nine months	85	”	”
285	”		88	”	”
300	”	or ten months	90	”	”
315	”		93	”	”
330	”	or eleven months	95	”	”
360	”	or twelve months	100	”	”

Important

You are required under the terms of this policy to Report Each Accident Promptly, whether trivial or not, and whether or not you think you are at fault. If possible, first telephone immediately a representative of the company located in the city where the accident occurs, then follow up with a completed notice promptly thereafter.

Obtain names and addresses of witnesses, at the time of the accident.

Cancellation Return Premium

	Month	Day	Year
Cancellation Effective	.....	.....	.....
Policy Effective	.....		
Period Earned	.....		
Original Premium (Total) $	.....		
Earned " "	.....		
Return " "	.....		

How Cancelled (short rate....., pro rata.....) (flat.....) decimal.....

State clearly reasons for Cancellation.....

.....

If rewritten given New Policy No.....

[Endorsed]: Filed United States District Court Feb. 10, 1933.

[Endorsed]: Filed United States Circuit Court Feb. 8, 1934.

(Testimony of E. H. Payne.)

Cross-Examination

I have been an insurance broker for 27 years, and I have known Dr. Fred Carfagni for about 12 years. As far as I know, I have handled all of Dr. Carfagni's insurance. It is correct that this policy, Plaintiffs' Exhibit No. 1 was a third renewal policy, and that I had originally procured the first policy from the National Union Indemnity Company. When I procured the first policy, I kept it in my office at all times. As far as I know, I kept all of his policies that were issued to Dr. Carfagni through me in my office and in my possession. If he had some policies by somebody else, I don't know. So far as the placing of the risk on these three insurance policies with the National Union, I had the management and control of the selection and placing of the risk.

F. KOCKLER,

called as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

I am a Deputy County Clerk of San Francisco. I have brought here the judgment roll and certain papers in the case of Eddy v. Carfagni, No. 229113 in the records of the Superior Court of the City and County of San Francisco. (The judgment roll in said action No. 229113, was thereupon offered and received in evidence. Said judgment roll showed

(Testimony of F. Kockler.)

that plaintiffs herein, as the only heirs at law of Mary Elizabeth Eddy, commenced and prosecuted an action against Fred R. Carfagni in the Superior Court of the City and County of San Francisco to recover damages for the death of Mary Elizabeth Eddy, which occurred on or about June 22, 1931, as a result of the negligence of said Fred R. Carfagni in the operation of a certain Lincoln automobile; and further showed that the trial of said action resulted in a judgment dated June 22, 1932 in favor of plaintiffs herein and against Fred R. Carfagni for $15,900 and costs of suit in the sum of $147.90. It was here stipulated [25] by counsel that no appeal was taken by Fred R. Carfagni from said judgment.

There was also offered in evidence writ of execution issued in said action of Eddy v. Carfagni on September 1, 1932, together with the return of sheriff indorsed thereon, showing that after proper search, he was unable to find any property belonging to said defendant in the City and County of San Francisco. Said documents were received in evidence and considered as read.)

FRED R. CARFAGNI,

called as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

In May and June, 1931 I was the owner of a certain Lincoln sedan automobile, motor No. 51834. I am still the owner of that automobile, and was the owner of it during the years 1929, 1930 and 1931.

(The plaintiff thereupon rested)

E. H. PAYNE,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

I have already testified that for twelve years I have acted as the insurance broker for Dr. Carfagni, and that during that time I believed that I handled all of his insurance and retained all of his policies in my office. Among the policies that I retained in my office were automobile policies which I had procured for Dr. Carfagni during the 12 years. I have brought with me my office records, from which I can testify as to the automobile policies which Dr. Carfagni procured through me. Dr. Carfagni had a fire and theft policy with the Security Insurance Company of California. That policy was obtained in July, 1926, and the period of the policy was from July 27, 1926 to July 27, 1927. My records show that that policy ran for one year. Dr. Carfagni did not have a public liability automobile insurance policy with the American Automobile Insurance

(Testimony of E. H. Payne.)

Company of St. Louis in the year 1927. He did not, to my [26] knowledge have any policy of automobile insurance with that company after the year 1926. He was in the Home Accident Insurance Company of Arkansas on July 27, 1928. The period that that policy was written for was from July 27, 1928 to July 27, 1929, but it did not run that long, because the company asked for a return of the policy. The company cancelled the policy. My records show that Home Accident Insurance Company elected to cancel the policy on August 13—I believe it was around August 10, 1928.

Mr. BARRY: I move to strike out the answer of the witness concerning cancellation of that policy, because the question as to whether or not the policy was cancelled would depend upon the terms of the policy itself, and the policy would be the best evidence of the procedure to be followed in the matter of cancellation.

The COURT: Motion denied; an exception noted.

(Exception No. 1.)

WITNESS continuing: I was asked in the subpoena to bring any notices of cancellation which I received. I have no such notices with me. My records are not complete as to this cancellation that you refer to. I am a member of the Insurance Brokers Exchange of San Francisco and was a member of that Exchange in the year 1928. The records that I now have in my hand do not show that I received a copy of a notice of cancellation.

(Testimony of E. H. Payne.)

I determined that the policy was cancelled on August 13, 1928, because my records show that I immediately replaced the insurance in another company. I replaced the insurance in the Travelers Insurance Company. I replaced the insurance with the National Liberty Fire Insurance Company or the Washington Underwriters. I placed a policy for Dr. Carfagni with the Washington Underwriters on October 5, 1928. The period of that policy was one year from October 5, 1928. That policy did not run to expiration, because the company asked me to replace it. I did not [27] receive any notice of cancellation of the policy of the Washington Underwriters. I replaced that insurance on June 1, 1929. I have in my hand a copy of the record of the policies I have taken out of my ledger in order to refresh my memory as to the transactions.

Mr. SUPPLE: We will offer in evidence, your Honor, the ledger sheet of Mr. Payne and also a memorandum which he has prepared from the ledger sheets.

WITNESS continuing: I compiled that memorandum from these four ledger sheets. As far as I know, the information contained in that memorandum is true and correct; it was taken from original records as a summary.

(The ledger sheets and summary were thereupon admitted in evidence and marked Defendant's Exhibit A).

[Printer's Note: Red ink entries in Exhibit A are shown by bold face figures.]

DEFENDANT'S EXHIBIT A.

DR. FRED CARFAGNI.

Company	Commencement Date		Policy	Premium	Replacement Date
Home Accident	7-27-28		14575	$157.30	8-13-28
Travelers	8-13-28		5855454	163.90	9- 5-28
Wash. Underwriters	9- 5-28		26503	164.92	10- 5-28
Western States	10- 5-28	22068	A26543	188.02	6- 1-29
					Expiration Date
Nat'l. Union	6- 1-29		622599	195.04	6- 1-30
Nat'l. Union	6- 1-30		619666	197.94	6- 1-31
Nat'l. Union	6- 1-31		627670	176.82	- -
Lincoln Casualty		7-27-25	109820	$ 95.70	Expiration 7-27-26
Miller's Nat'l.		7-27-26	3979	126.69	" 7-27-27
U. S. A.		7-27-27	26629	125.10	" 7-27-28

Check #3994 Paid to National Union Insurance Company on June 24th. 1931 in the amount of $132.61.

CARFAGNI, FRED R.
580 Green St.

— 1925 —

Date	Folio	Building	Stock	Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
1488—										
Apr. 1	J-1					N. Y. Ind.	4-5-26	60-637	186.00	
1	”					Security		39032 R.P.	21.96	
1	”					Aetna Life		105070	10.00	
4317—										
29	C-10				Star	Security	4-25-26	44056 Can.	88.82	
June 26	C-26							a/c		75.00
July 10	C-31									50.00
22	C-35									60.00
21	C-35			1000.		Yorkshire	8-18-26	7104	10.60	
4460—										
Aug. 4	C-38				Lincoln	Lincoln Cas	7-27-26	109820	95.70	
4	C-38				”	Security	term	46959	21.47	
21	C-44									50.00
20	C-41				Liab.	Aetna Cas.	9-16-26	123248	15.50	
20	C-44			1800.		Yorkshire	9-15-26	7386	19.08	

Date	Folio	Building	Stock	Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
Sept. 2	C-49									50.00
18	C-55									25.00
25	C-58			1200.		Yorkshire	10-29-26	7806	12.72	
Oct. 9	C-64									50.00
14	C-65				All risks	Threadneedle	11-3-26	10055	38.78	
16	C-66								31.96	57.17
Nov. 5	C-71									20.00
								Bal. Down		51.50
— 1926 —									488.67	488.67
Jan. 1								Forwd.	51.50	
5	C-89									25.00
25	C-95									26.50
Mar. 25	110				Star	Millers Nat.	3-20-27	1849	82.65	
1488—										
31	112				Acc. & H.	N. Y. Ind.	4-5-27	50-637	186.00	
Apr. 6	114					Security		44056	8.28	
20	117							a/c		75.00

CARFAGNI, DR. FRED R.
580 Green St.

Date	Folio	Building	11 - 15th Ave. HHld. Fur.	Fixtures	Various	Company	Expires	Policy	Premium Dr.	Cr.
May 12								Forward		
13	125							a/c		75.00
June 2	130									50.00
16	132				Lincoln	Millers Nat'l	7-27-27	3979	126.69	
July 12	139									25.00
17	141									35.37
16	141			1000.		Yorkshire	8-18-27	10052	10.60	
29	144		2500.			St. Paul	8-18-29	657602	12.50	
Aug. 10	146				Dent. Liab.	Aetna Life	9-16-27	0151352	15.50	
10	146			1800.		Yorkshire	9-15-27	10222	1908	
Sept. 23	159			1200.		Yorkshire	10-29-27	8884	12.72	
27	159									50.00
Oct. 18	164					Millers		1849	28.09	
23	165				All risk	Century	11-3-27	102407	51.56	
25	166							a/c		50.00
25	166					Century	Co. Can'd.	102407	51.56	

Date	Folio	Building	Stock	Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
Nov. 8	172									50.00
Dec. 2	176									19.00
— 1927 —									480.87	480.87
2210—					Accident &					
Mar. 23	206				Health	Cont. Cas.	4-5-28	7097205	201.00	
Apr. 13	212							a/c		100.00
14	213			1200.		Mechanics	3-29-28	404393	12.72	
14	213	2500.				Yorkshire	4-13-30	38390	12.50	
Apr. 22	215				Golf Liab.	Pac. Ind.	4-20-28	10275	7.50	
May 3	219					Mechanics		404225	5.17	
16	221									25.00
June 3	227									25.00
5217—										
4	227				Lincoln	U. S. A.	7-27-28	26629	125.10	
July 18	237							a/c		25.00
18	237									

CARFAGNI, FRED R.
580 Green St.

Date	Folio	Building	11 - 15th Ave. 580 Green Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
July 18							Forward		
22	238						a/c		25.00
22	239		1000.		Yorkshire	8-18-28	38813	10.60	
Aug. 10	243								50.00
20	244				Aetna Cas.	9-16-28	0151352	15.50	
20	246				Imp. & Exp.	9-1-30	15946	50.00	
20	246		1800.		Yorkshire	9-15-28	38955	19.08	
23	246								25.00
Sept. 17	253								25.00
17	253		1200.		Yorkshire	10-29-28	47597	12.72	
Oct. 3	256								25.00
19	259								25.00
26	261								25.00
Nov. 15	268		2500.		Yorkshire	12-1-30	47788	12.50	
23	270								25.00
Dec. 31							Bal down		74.05

Date	Folio	11 - 15th Ave. Building	Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
— 1928 —								**474.05**	**474.05**
Jan. 1							Forward	74.05	
6	280								25.00
19	284								25.00
27	285								24.05
2355—									
Mar. 10	298			Golf Liab.	Pac. Ind.	4-20-29	LS10356	7.50	
19	298			Acc. & health	Cont. Cas.	4-5-29	7097205	201.00	
19	300		1200.		Yorkshire	4-29-29	48283	12.72	
27	302								25.00
Apr. 10	306								25.00
23	310								25.00
May 18	316								25.00
24	318								25.00

CARFAGNI, FRED R.
580 Green St.

Date	Folio	Building	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
May 24							Forward	295.27	199.05
June 13	323								25.00
20	325								50.00
5844—									
19	324			Lincoln	Home Acc.	7-27-29	14575	157.30	
19	325	1000.			Yorkshire	7-14-31	48634	5.00	
19	325				Home Acc.	A. P.	14575	3.12	
July 20	332		1000.		Yorkshire	8-18-29	48792	10.60	
25	333								25.00
Aug. 9	337								25.00
18	338			Lincoln	Travelers	8-13-29	5855454	163.90	
5893—									
20	339			"	Travelers	8-13-29	AV503388	15.50	
20	338			Dent. Liab.	Aetna Life	9-16-29	051352	15.50	
20	339		1800.		Yorkshire	9-15-29	48902	19.08	
30	342								25.00

Date	Folio	Building	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
Sept. 13	344								25.00
17	344								25.00
5900—									
20	345			Lincoln	Wash. Und.	9-5-29	26503	164.92	
20	345		1200.			10-29-29	48961	9.00	
Oct. 3	349								25.00
6	349				Wash Und.		26503	151.18	
6	349				Travelers			15.50	
6	349				Travelers			163.90	
Aug. 20	339				Home Acc.			160.42	
5925—							22068		
Oct. 12	351			1929 Lincoln	West. States	10-5-29	A26543	188.02 Can.	
18	353								25.00
Nov. 1	357								25.00
2447—									
24	362			Fur Coat	Norwich Un.	11-17-29	J2067	24.00	
Dec. 4	364								25.00
19	368								25.00

CARFAGNI, DR. FRED R.
580 Green St.

Date	Folio	Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
Dec. 19								Forward	580.21	524.05
31								Bal. down		56.16
— 1929 —										
Jan. 1								Forward	56.16	
7	372									25.00
24	377									25.00
Feb. 2	380									6.16
23	384			1200.		Yorkshire	3-29-30	50513	12.84	
Mar. 11	388									25.00
2210—										
21	389				Acc & Health	Cont. Cas.	4-5-30	PD7097205	201.00	
2492—										
21	390				Golf Liab.	Pac. Ind.	4-20-30	LS10381	7.50	
27	392									25.00

Date	Folio	Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
048—										
Apr. 2	394				Diana	West. States	3-27-30	100119	141.50 Can.	
4	395									25.00
15	396									25.00
23	399									25.00
May 6	402									25.00
13	402									25.00
21	403									25.00
June 5	408									25.00
12	409									25.00
6106—										
18	411				Lincoln	Nat'l. Un.	6-1-30	622599	195.04	
24	412									25.00
July 3	415				Diana	West. St.		100119	101.48	
13	416					Federal Un.	8-18-32	600130	12.50	
13	416			1000.		Federal Union	8-18-30	600120	12.30	
16	418									25.00
18	419					West. States		26543	43.77	
18	419					,, ,,		22068	15.82	

CARFAGNI, DR. F. R.
580 Green St.

Date	Folio	Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
July 18								Forward		
Aug. 17	424			1800.		New Bruns.	9-15-30	702190	13.50	
20	425				Dentist Liab.	Aetna Life	9-16-30	0151352	15.50	
30	427									25.00
Sept. 11	429									25.00
23	431									7.25
23	431			1200.		Yorkshire	10-29-30	494037	9.00	
24	432									125.00
Oct. 7	434									25.00
29	438									14.36
2580—										
Nov. 12	440				Fur coat	Nor. Union	11-17-30	J2401	19.20	
Dec. 17	447									30.00
31								Bal down		27.20
									534.97	534.97

Date	Folio	Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
— 1930 —										
Jan. 1								Forw'd	27.20	
10	452									27.20
Feb. 19	463			1200.		Yorkshire	3-29-31	494309	12.84	
Mar. 19	468				Golf Liab.	Pac. Ind.	4-20-31	LS10421	7.50	
19	469	2500.				Yorkshire	4-13-33	492247	12.50	
May 14	480									25.00
May 14	480				Lincoln	Nat'l. Union	6-1-31	619666	197.94	
May 28	483									25.00
June 6	486									25.00
July 1	491									25.00
July 7	491			1000.		Federal Union	8-18-31	600408	12.30	
July 10	492									25.00
July 12	493				Dentist Liab.	Aetna Life	9-16-31	0151352	15.50	
July 17	494									25.00
July 31	496									25.00

CARFAGNI, DR. F. R.
580 Green St.

Date	Folio	Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
								Forward		
Sept. 10	503									25.00
Sept. 12	503			1200.		Yorkshire	10-29-31	494695	9.00	
Sept. 26	505									30.78
Oct. 16	510				Fur Coat	Norwich Un.	11-17-31	AR3018	15.30	
Oct. 28	511									12.30
Nov. 7	513		2500.			Yorkshire	12-1-33	494784	12.50	
Nov. 13	514									15.50
Dec. 23	521									9.00
Dec. 16	525							Balance Down		27.80
									322.58	322.58

Date	Folio	Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
— 1931 —										
								Forward	27.80	
Jan. 16	525									15.30
Feb. 10	530			1200.		Yorkshire	3-29-32	494929	8.64	
Mar. 5	534									12.50
Mar. 6	534				Golf Liab.	Pac. Ind.	4-20-32	LS11040	7.50	
May 15	546									7.00
May 18	548				Lincoln	Nat'l. Union	6-1-32	627670	176.82	
June 10	553									25.00
June 15	555		1000.			Yorkshire	7-14-34	495152	5.00	
June 23	556									176.00
June 26	556									.82
June 30	557				Check returned.				25.00	
July 14	559									9.14
July 17	560			1000.		Pac. Natl. Fire	8-18-32	61892	7.20	
Aug. *14*	*566*			1800.		Columbia	9-15-32	1658	12.96	
Aug. *14*	*566*				Dentist Liab.	Aetna Life	9-16-32	0151352	15.50 Can.	
Sept. 17	572									5.00

CARFAGNI, FRED R.
580 Green St.

Date	Folio	Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
								Forward		
Sept. 18	572			1200.		Yorkshire	10-29-32	495326	8.64	
		Building								
Oct. 19	578	Adding F. B. C. with Loss Payable.				Yorkshire		492247	1.23	
Oct. 19	578				Fur Coat	Norwich Un.	11-17-32	3420	14.00	
Oct. 20	579									7.20
Nov. 25	585									3.82
Dec. 3	587									10.00
Dec. 19	590									10.00
								Balance Down		28.51
									310.29	310.29
— 1932 —								Forward	28.51	
Jan. 29	598									10.00
Feb. 3	599				Dentist Liab.	Aetna Life		0151352	11.68	
Feb. 9	600									10.00
Feb. 20	603			1200.		Yorkshire	3-29-33	815528	8.64	
Feb. 25	603				Dentist Liab.	Aetna Cas.	2-9-33	0151352	15.50	
Mar. 2	606									10.00
Mar. 11	607				Golf Liab.	Pac. Ind.	4-20-33	LS11097	7.50 Cancelled	

Date		Building	Furniture	Office Fixtures	Various	Company	Expires	Policy	Premium Dr.	Premium Cr.
April 8	613									5.00
May 31	623									8.64
July 15	630		2500.			Ins. Co. N. A.	8-18-35	668158	12.50 Cancelled	
15	630			1000.		Pacific Nat'l.	8-18-35	63573	7.20 Cancelled	
Aug. 22	636			1800.		Aetna	9-15-33	318860	12.95 Cancelled	
Sept. 7	639	Cancelled				Pac. Ind.		LS11097		7.50
Sept. 21	641			1200.		Yorkshire	10-29-33	815808	8.64 Cancelled	
Oct. 14	646				Fur Coat	Norwich Un.	11-17-33	3714	5.60 Cancelled	
Nov. 11	651	Cancelled								12.50
" "	651	Cancelled								7.20
Dec. 2	655	Cancelled								12.95

[Endorsed]: Filed United States District Court Feb. 10, 1933.

[Endorsed]: Filed United States Circuit Court Feb. 8, 1934.

[Testimony of E. H. Payne.]

WITNESS continuing: The word "Replacement" was put in that summary (part of Defendant's Exhibit A) when I made it out or my bookkeeper made it out. As far as I know, the word "Replacement" was written in there at the time of the other writing. That was made out by my daughter, who is my bookkeeper. She is not present in court, but she is at my office. This summary was prepared when I took the records out, as I recall it, yesterday. I took out a full coverage insurance policy for Dr. Carfagni in the Travelers Insurance Company. The policy was taken out on his automobile. As far as I can recall, the Travelers Insurance Company policy was secured the same day that the Home Accident Insurance Company cancelled its policy. The Travelers Insurance Company did not cancel that policy. The Home is the one that cancelled the policy. They cancelled it on August 13, 1928, and then I immediately placed the insurance in the Travelers on that date. The Travelers' policy ran until September 15, 1928. On September 5, 1928, I took out a policy covering the automobile with the Washington Underwriters, and that policy ran until October 5, 1928. [28] On October 5, 1928, I took out another policy covering the same automobile in the Western States Insurance Company, and that ran until June 1, 1929.

On June 1, 1929, I took out the policy with the National Union Indemnity Company. I took out another policy in 1930, and I took out a third policy

[Testimony of E. H. Payne.]

on June 1, 1931. I do not know whether or not the word "Cancellation" was ever written upon that summary (referring to a part of Exhibit A). That summary is a copy of the larger document, (referring to the ledger sheets, which are also a part of Defendant's Exhibit A).

Q. That was either a replacement or cancellation? A. Yes.

Q. What is the difference?

A. There is no difference between a replacement and a cancellation.—If I may go further into the thing, as a rule, when a company wishes to retire from a risk that they feel is not satisfactory, they phone or write to the broker to replace the insurance in some other company before they send a cancellation notice, and the policy is usually taken up and replaced with some other company, without any notice of cancellation being given by the company, and that is the case with most of these cancellations. You will notice that these cancellations were mostly during the period of two or three months, and besides you will notice this same car was insured for three years straight without any cancellation, and during the period of this time for these few months, there was trouble with losses, and the companies thought that the risk was not desirable, and asked me to replace it. The only one which I recall which cancelled was the Home Accident. They wanted it cancelled and requested that

[Testimony of E. H. Payne.]
the policy be taken up, and the risk placed with some other company.

Mr. BARRY: As I understand it, that memorandum would be admitted here and is admitted to the extent that it is a true summary, a copy of the document that is in. [29]

The COURT: It was admitted on the theory that it was a summary.

Mr. SUPPLE: A summary of the figures, but not of the words here.

Mr. BARRY: I am willing to give you that admission, Counsel.

WITNESS continuing: I have not the notice of cancellation that I have just told his Honor was sent by the Home Accident Company. I do not recall whether notice was sent on that cancellation or not.

The COURT: Q. Did you not say that there was one company where there was a cancellation?

A. Yes, your Honor, that was the Home Accident. I think there was a cancellation, but I am not sure, because I have not records that far back.

Q. That is the one concerning which you have been examined? A. Yes.

Q. There was a cancellation in that?

A. I believe there was.

WITNESS continuing: I do not recall whether during the period from the year 1927 to 1931 I notified Dr. Carfagni of the trouble in placing the risk. During that period of time, the selection of

[Testimony of E. H. Payne.]

the companies in which to place the risk was left entirely in my hands—as every other matter pertaining to insurance was left in my hands.

Cross-Examination

I took up the matter of placing Dr. Carfagni's Insurance in the National Union Indemnity Company with Mr. Phil Sullivan. I first talked with Mr. Sullivan about Dr. Carfagni's policy, his Lincoln automobile policy, being placed in the National Union Indemnity Company on June 1, 1929. Mr. Sullivan was the manager of the automobile department of the National Union Insurance Company. He was the one who handled the matter of soliciting and obtaining insurance for the company. I took the matter up with him on that occasion in the office of the National Union on Pine Street. I had known Mr. Sullivan for [30] a number of years in connection with other companies, and he, as manager of the company, asked me for business, and he solicited my business on various occasions before I gave him this insurance. I called at his office and submitted the insurance on Dr. Fred Carfagni's car to him, which he accepted and delivered the policy to me, and the premium was paid. I gave to Mr. Sullivan at that time the information that he asked for concerning the Carfagni policy that I desired to have issued by the National Union Company. The information was the name of the insured, his address, his occupation, the kind

[Testimony of E. H. Payne.]

of a car, the model, the year, the engine number and the limit of liability required. After that information was given, a policy was issued.

Mr. BARRY: Have you got that policy, Counsel, the one issued in 1929?

Mr. SUPPLE: No, Mr. Payne has it or should have it. We have a daily report.

WITNESS continuing: I have not the policy that was issued at that time. I have made a search of my files for the purpose of determining whether or not in those files was the policy issued by the National Union in 1929 and also the policy issued in 1930. I never keep expired policies.

Mr. BARRY: Could I have the daily?

Mr. SUPPLE: Yes. (Handing document to Mr. Barry)

WITNESS continuing: When a company issues a policy, it makes out what is called a daily, a copy of insurance. (Mr. Barry here hands the document which he had received from Mr. Supple, to the witness)

The WITNESS continuing: The policy was the same as that daily issued by the National Union under date of June 5, 1929. A copy of the daily was sent to me at that time with the policy. The daily was intended for my files, the company [31] keeping another copy of the daily. This document that has been referred to as a daily is practically a copy of the first page or the face of the policy, without any of the finer print which appears on the back pages

[Testimony of E. H. Payne.]
of the policy. (Plaintiffs then offer in evidence the daily of the 1929 policy, and the same was received in evidence and marked as Plaintiffs' exhibit 2)

PLAINTIFFS' EXHIBIT NO. 2.

Folio No. 5503 I. Policy No. 622599.

Leave this space blank

Amount Premium Make

F .....

T .....Age

C .....

..... N-SH

Tor .....

Sl .....Col.

CV .....

Agency, San Francisco, Cal.

Combination Automobile Policy
National Union Fire Insurance Company
and
National Union Indemnity Company
Pittsburgh, Pa.

Declarations

1. Name of Assured—Fred R. Carfagni.
2. Address of Assured — 580 Green Street, San Francisco, California.
3. Assured is.....(Individual, Co-partnership, Corporation or Estate)—Individual.

[Testimony of E. H. Payne.]

4. Assured's occupation or business is—(State in Full)—Dentist.
5. This Policy shall be in effect for a period of Twelve (12) Months from 12 o'clock noon, standard time at assured's address June 1st, 1929 to 12 o'clock noon, standard time at assured's address June 1st, 1930.
6. The following is the description of the Automobile and the facts with respect to purchase of same:

   Model, Year, 1929. Model, No. or Letter..... Trade Name, Lincoln. Type of Body (If Truck, state Tonnage), Sedan. Serial No..... Motor No. 51834. Horse Power..... No. of Cylinders 8. List Price $.....

   Purchased by the Assured—Month, Oct. Year, 1928. New or Second Hand—New. Actual Cost to Assured (Including Equipment) — $5055.00. Is Automobile Fully Paid For?—(Yes or No). ..... Amount Unpaid? $..... No. Unpaid Notes?..... Notes Payable Monthly (If not, state method of payment).....

   Subject to all the stipulations, provisions and conditions contained in this policy, loss, if any, is payable to Assured as interest may appear. (Give name of Person, Firm or Corporation holding any Encumbrance.)
7. The above described automobile is and will be during the period of this policy, used for the following purposes: Business & Pleasure.

[Testimony of E. H. Payne.]

8. The above described automobile is and will be during the period of this policy, principally used and garaged in the city named in Declaration 2, except as follows: No exceptions.

9. No company has cancelled or refused to issue any kind of automobile insurance for the Assured during the past three years, except as follows: No exceptions.

The Company shall be liable only under that section or those sections of the policy for which a specific premium charge is made below.

Amount of Insurance, $4000.00. (Insert either a Specific Amount or Words "Actual Cash Value.")

Part 1—National Union Fire Insurance Company.

Sections 1 and 2. Fire and Transportation.

Rate 20¢. Premium $8.00.

Section 3. Theft.

Credit allowed for.....Locking Device (Give name or insert word "None"), subject to Locking Device clause on page two.

Rate 30¢. Premium $12.00.

Section 4. Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, Accidental, and External Discharge or Leakage of Water.

Rate..... Premium $ Nil.

Section 5. Collision or Upset in excess of $ Full Cov. (insert "Full Coverage," "$50.00," or "$100.00" deductible according to coverage desired), subject to Collision peril clause on page two. Credit allowed for.....Bumpers. (Give name, indicating "Front," "Rear," or

[Testimony of E. H. Payne.]

"Front and Rear," or insert word "None"), subject to Bumper clause on page two.

$50.00 Extra Equipment. Premium $5.00, $102.00.

Part One, Total Premium, $127.00.

Part 2—National Union Indemnity Company.

Section 6. Liability for Bodily Injuries or Death—(a) Limit one person ($15,000.00). (b) (Limit one accident ($30,000.00). Premium $55.04. Liability for Damage to property of others. (c) Limit one accident ($1,000.00). Premium $13.00.

Part Two, Total Premium, $68.04.

Total Premium, Part One and Two, $195.04.

Countersigned at San Francisco, Cal., this 5th day of June, 1929.

.....

Authorized Agent for both Companies.

Standard Forms Bureau Form 346 (Feb. 1919)

Balance Due—$1258.93

Loss Payable Clause

Loss, if any, subject to all the terms and conditions of this policy, is payable to Anglo California Trust Company.

Attached to Policy No. 622599 of the (Name of Company) National Union Fire Insurance Company.

Issued to Fred R. Carfagni.

Agency at San Francisco, Calif.

Dated October 5th, 1929.

1929—Lincoln Sedan—Motor #51834.

LEO. POCKWITZ CO., Inc.,

Agent.

Trade Mark—Standard—346. Feb. 1919.

[Testimony of E. H. Payne.]

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

619666—Folio 5573.
Loss Reported Under this Policy.
Renewed.
Amer. Re-Ins. Co.
P25192 1204
Examined Jul. 9, 1929. R. C. A., Jr.
R. I.
X
Loss Reported Under [illegible].
Renewed.
Examined Oct. 16, 1929. R. C. A., Jr.
Leave off.
Renewed.
Correct Oct. 5, 1929. CH, Examiner.
Received Oct. 7, 1929. Pacific Dept.
Order says Ins. was overlooked absolutely.
No claims.
Correct Jun. 18, 1929. CH, Examiner.
Register Jun. 14, 1929.
Accounts Jul. 2, 1929.
Mapped .....
Reins. Jun. 26, 1929.
Expiration Aug. 2, 1929.
Fire Record .....
Com'l Rating .....
Bordereaux Jul. 3, 1929.

Board .....
43.00.
Coll. 26480 (NC) 28286 (11.83 Coll.) 3A.
State..... Agency..... Make of Car 208. Age 1. Premium or Additional Premium—Liability 4000.00. Total Premium 127.00. Fire Premium 8. Theft Premium 17. Deb. Prem. 3. Collision Premium 102. P. D. Premium..... O. C. Gov. Code ..... Other Coverage Premium..... Policy Number 599. Return Premium.....

National Union Indemnity Co.—Automobile Classification

Liab.—Kind of Bus. 1. State 04. City 43. Year of Issue 29. Term in Months 12. Expiration—month 6, Year 30. Classification 1134. Limit 15/30. Premium 55.04. Exposure 12. Coverage 1. Comsn. 3A.

P. D.—Kind of Bus. 3.....
Classification 1134. Limit 1. Premium 13.00. Exposure 12. Coverage 2. Comsn. 3A.

Coll.—Kind of Bus 4.....
Coverage 3.....
Total .....
Premium 68.04.....

[Endorsed]: Filed United States District Court Feb. 10, 1933.

[Endorsed]: Filed United States Circuit Court of Appeals, Feb. 8, 1934.

[Testimony of E. H. Payne.]

WITNESS continuing: I have looked through my file for the purpose of determining whether I have a copy of the daily that reached me at or about the time it was issued. I have no such copy. This policy of June, 1929 was renewed at the request of the company, and the new policy was issued on or about the expiration date. The company sent me an expiration notice, asking me if they should renew the policy, and I told them to renew it. When I say "renew the policy" I am referring to the issuance of a new policy. A new policy was issued at that time.

(Counsel for defendant here hands counsel for plaintiffs a copy of the daily of the 1930 policy)

WITNESS continuing: This document which purports to be a daily issued May 9, 1930, which you now show to me, is a copy of the face of the policy that was issued on or about that time to Dr. Carfagni by the same companies as those that issued the policy in 1929. I am referring to the printed and typewritten part of the document, to the document without all the stamps and longhand writing upon it.

Mr. BARRY: I offer this in evidence at this time, may it please your Honor, and ask that it be marked "Plaintiffs' Exhibit 3". This refers to renewing 622599, folio 5503.

The WITNESS: Pardon me, Counsel, what is the folio number there?

[Testimony of E. H. Payne.]

Mr. BARRY: The folio number is—A 619666 [32]

Mr. SUPPLE: It is on the right margin.

Mr. BARRY: 619666. That was the one issued on May 9, 1930, the policy period being from June 1, 1930 to June 1, 1931. This other document I am not offering at this time. It is referred to as a renewal order. It was no part of the policy that came back to you from the company? A. No.

Mr. BARRY: My offer, may it please your Honor, is of the daily itself, and not of this memorandum on the back.

(The daily of May 9, 1930 was thereupon received in evidence and marked Plaintiffs' Exhibit 3.)

PLAINTIFFS' EXHIBIT NO. 3.

Form CFI-1

Agency, San Francisco.

Folio No. 5513 I. Policy No. 619666

Leave this space blank

Amount Premium Make

F .....

T .....Age

C .....

..... N-SH

Tor .....

Sl .....Col.

CV .....

[Testimony of E. H. Payne.]

Renewing 622599—Folio 5503
Combination Automobile Policy

National Union Fire Insurance Company
and
National Union Indemnity Company
Pittsburgh, Pa.

Declarations

1. Name of Assured—Fred R. Carfagni.
2. Address of Assured — 580 Green Street, San Francisco, California.
3. Assured is.....(Individual, Co-partnership, Corporation or Estate)—Individual.
4. Assured's occupation os business is—(State in Full) Dentist.
   ..... Employed by .....
5. This Policy shall be in effect for a period of Twelve Months from 12 o'clock noon, standard time at assured's address June 1, 1930 to 12 o'clock noon, standard time at assured's address June 1, 1931.
6. The following is the description of the Automobile and the facts with respect to purchase of same. Model, Year, 1929. Model No. or Letter, ... Trade Name, Lincoln. Type of Body (If Truck, state Tonnage), Sedan. Serial No. ..... Motor No. 51834. Horse Power, ... No. of Cylinders, 8. List Price, $.....

[Testimony of E. H. Payne.]

Purchased by the Assured, Month, October, Year, 1928. New or Second Hand, New. Actual Cost to Assured (Including Equipment), $5055.00. Is Automobile Fully Paid For (Yes or No). Yes. Amount Unpaid? $..... No. Unpaid Notes? ..... Notes Payable Monthly (If not, state method of payment) .....

Subject to all the stipulations, provisions and conditions contained in this policy, loss, if any, is payable to Assured as interest may appear. (Give name of Person, Firm or Corporation holding any Encumbrance.)

7. The above described automobile is and will be during the period of this policy, used for the following purposes Business & Pleasure.
8. The above described automobile is and will be during the period of this policy, principally used and garaged in the city named in Declaration 2, except as follows: No exceptions.
9. No company has cancelled or refused to issue any kind of automobile insurance for the Assured during the past three years, except as follows No exceptions.

The Company shall be liable only under that section or those sections of the policy for which a specific premium charge is made below.

Amount of Insurance (Insert either a Specific Amount or Words "Actual Cash Value") $3000.00.
Part 1—National Union Fire Insurance Company.
Sections 1 and 2.—Fire and Transportation. Rate .25, Premium, $7.50.

[Testimony of E. H. Payne.]

Section 3. Theft—Theft Clause C applicable, Rate .30, Premium $9.00.

Additional Premium, broad form coverage $50.00, Rate, ——, Premium, $5.00.

Section 4. Tornado, cyclone, windstorm, hail, earthquake, explosion, accidental, and external discharge or leakage of water. Rate, Nil; Premium, $ Nil.

Section 5. Collision or Upset in excess of $ Full Cov. (insert "Full Coverage," "$50.00," or "$100.00" deductible according to coverage desired), subject to Collision peril clause on page two.

Credit allowed for Bumpers. (Give name, indicating "Front," "Rear," or "Front and Rear," or insert word "None"), subject to Bumper clause on page two. Premium, $102.00.

Part One, Total Premium, $123.50.

Part 2—National Union Indemnity Company.

Section 6. Liability for bodily injuries or death (a) Limit one person ($15,000.00); (b) Limit one accident ($30,000.00) Premium $61.44.

Liability for damage to property of others (c) Limit one accident ($5,000.00) Premium $13.00.

Part Two, Total Premium, $74.44.

Total Premium Part One and Two, $197.94.

Countersigned at .....

This ..... day of 5/9/30.

E. H. PAYNE

Authorized Agent for both Companies.

[Testimony of E. H. Payne.]

Policy No. 622599; Folio No. 5503. Renewal Order. Amount $3000.

Fire @ .25, $7.50.

Theft @ .30, $9.00.

Extra Equipment .50, $5.00.

Plate glass .....

Collision (Full Cover.) $102.00.

Public Liability (15/30 M) $61.44.

Property Damage (5000M) $13.00.

Total, $197.94.

Attach.....Endorsement

Attach.....Endorsement

Previous Losses

Fire —— ——

Theft —— ——

Coll. No. 2. Amt. Paid $12.00.

P. L. —— ——

P. D. —— ——

Misc. —— ——

Commission

F. & T.

Coll.

P. D.

P. L. 25%

N M.

Underwriter

Agent or Broker, E. H. PAYNE, 114 Sansome,

.....Date Ordered.

Renewal recommended by W. Grady 5/8/30.

[Testimony of E. H. Payne.]

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

Amer. Re-Ins. Co.
L39009 13.44
627657.
R. I.
Examined Jun. 5, 1930. G. M. R.
Renewed.
Correct May 10, 1930. Examiner.
Loss Reported Under This Policy.
Renewed.
Renewed.
Register May 10, 1930.
Accounts Jun. 1, 1930.
Mapped .....
Reins. May 21, 1932.
Expirations May 10, 1930.
Fire Record .....
Com'l Rating .....
Bordereaux Jun. 2, 1930.
Board .....
48.00

State..... Agency..... Make of Car..... Age..... Premium or Additional Premium—Liability..... Total Premium..... Fire Premium ..... Theft Premium..... Deb. Prem..... Collision Premium..... P. D. Premium..... O. C. Gov. Code..... Other Coverage Premium ..... Policy No..... [Note: figures in this class-

[Testimony of E. H. Payne.]

ification have been scratched.] Return Premium .....

National Union Indemnity Co.—Automobile Classification

Liab.—Kind of Bus. 1. State 04. City 43. Year of Issue 30. Term in Months 12. Expiration—Month 6, Year 31. Classification 1134. Limit 15/30. Premium 61.44. Exposure 12. Coverage 1. Comsn. 2B.

P. D.—Kind of Bus. 3.....(132) Classification 1134. Limit 7. Premium 13.00. Exposure 12. Coverage 2. Comsn. 2B.

Coll.—Kind of Bus. 4..... Coverage 3. .....

Total.....Premium 74.44 .....

Account—Year 30, Month 6. State 5, City 2. Folio 5513. Policy Number 619666. Kind 4. Form 1. Make of Car 023. Age 2. Liability 300. Total Premium $123.50.

Fire Code 1. Fire Premium 8. Theft Code 5. Theft Premium 14. Coll. Code. 10. Collision Premium 102. P. D. Code..... [illegible] Premium..... O. C. Code..... Other Cover Premium..... Commission 2B.

22652 24138 33320

[Endorsed]: Filed U. S. Dist. Court, 2/10/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

[Testimony of E. H. Payne.]

WITNESS continuing: The next policy was the one which is already in evidence here, and which is the basis of this particular action. In 1929, when I first took up the matter of Dr. Carfagni's insurance with Mr. Sullivan, I had no conversation with him about whether Dr. Carfagni had ever had any automobile insurance issued to him cancelled or refused by any company. Neither Mr. Sullivan nor anyone else connected with the National Union Indemnity Company, at the time that I applied for this insurance or at the time that it was issued or at any other time, asked me whether Dr. Carfagni had ever had any kind of an automobile insurance issued to him, cancelled or refused. That question was never asked. I did not say anything to Mr. Sullivan or to anyone else connected with the National Union Indemnity Company as to whether or not Dr. Carfagni at any time prior to that time had any insurance, automobile or other insurance, cancelled by any other company or refused to him by any other company. That subject never was discussed. It was not discussed at any time from the first time that I spoke to Mr. Sullivan and the National Union Company about placing Dr. Carfagni's insurance in that company up to the time and until [33] after the time of the happening of the accident, which is the basis of this particular suit. That is true concerning the conversation had at the time the policies were issued in 1930 and also concerning the conversation had at the time the policy was issued in 1931.

[Testimony of E. H. Payne.]

Concerning the conversation had with Mr. Sullivan at the time that the policy was issued in 1930, he sent me a renewal notice, and I immediately ordered the policy renewed a month before it expired. There was no conversation at all at that time concerning matters which would be inserted into a new policy issued to Dr. Carfagni. When the present policy upon which this suit was brought, was issued in 1931, the same procedure was followed.—They sent me an expiration notice, and I ordered the policy renewed a month before it expired.

Mr. BARRY: As a matter of fact, the policy, may it please your Honor, upon which this suit was brought, was countersigned May 13, 1931, and the other would not have expired until June 1, 1931.

WITNESS continuing: I reported losses to the National Union Indemnity Company under the policy that was issued in 1929, and that was in effect from June 1, 1929 to June 1, 1930. I took up with the National Union Indemnity Company the matter of adjusting losses on behalf of Dr. Carfagni. I cannot recall the number of losses which were reported to National Union Indemnity Company under that first policy, because my records have been disposed of. I have no records of those losses, but I believe the National Union could give those records complete, as to the number of losses, as they keep a complete record of those cases.

[Testimony of E. H. Payne.]

To the best of my recollection, there were losses of Dr. Carfagni reported to the National Union Indemnity Company under the policy issued in 1930, and which was in effect from [34] June 1, 1930 until June 1, 1931, the policy which immediately preceded the one which is the basis of this suit. I have no way of telling how many losses there were reported to the National Union Indemnity Company under those two policies which were in effect from June 1, 1929 to June 1, 1931, because my records are not complete on that, as I told you before; the records show the exact number of losses. I could not tell you, because I could not recall. The losses to which I have referred took the form of presentation of claims and the payment of those claims by the company. The matter of those claims, the presentation of them and details in connection with the settlement or adjustment of them were handled through me.

Mr. BARRY: Mr. Supple, have you a record of those losses that I could offer at this time in connection with Mr. Payne's testimony?

Mr. SUPPLE: Yes. I think that the first loss was September, 1929, nothing paid; the next loss on January 18, 1930 was $11.85 for a collision, and then in 1930, September 10, property damage, $41.75, and then the next payment shown on this record is in December, 1930, collision, $95.23.

(Mr. Supple then hands the document entitled "Claim Record, Fred R. Carfagni" to Mr. Barry, who shows it to the witness).

[Testimony of E. H. Payne.]

WITNESS continuing: I have no recollection of any claim other than those noted upon this document.

(The document entitled "Claim Record, Fred R. Carfagni" was thereupon offered and received in evidence and marked Plaintiffs' Exhibit 4).

PLAINTIFF'S EXHIBIT NO. 4.

Agent.....

CLAIM RECORD

Broker, E. H. Payne

Name, Fred R. Carfagni.

Claim No. 26480. Policy No. 622599. Date Acc. 9-12-29. Kind of Car Lincoln. Kind Acc. Coll. Amt. Paid Nc. Date closed 5-12-30.

Claim No. 28286. Policy No. 622599. Date Acc. 1-1-30. Kind of Car Linc. Kind Acc. Coll. Amt. Paid 11.83. Date closed 3-18-30.

Claim No. 22652. Policy No. 619666. Date Acc. 9-10-30. Kind of Car Linc. Kind Acc. PD. Name of Driver, Petri. Amt. Paid 41.75. Date Closed 12-1-30.

Claim No. 24138. Policy No. 619666. Date Acc. 12-12-30. Kind of Car Linc. Kind Acc. PD. Name of Driver Taco. Amt. Paid C. W. P. Date closed 4-14-31.

Claim No. 33320. Policy No. 619666. Date Acc. 12-12-30. Kind of Car, Linc. Kind Acc., Coll. Amt. Paid 95.23. Date closed 6-22-31.

[Testimony of E. H. Payne.]

Claim No. 33434. Policy No. 627670. Date Acc. 6-22-31. Kind of Car, Line. Kind Acc. Coll.

Claim No. 25852. Policy No. 627670. Date Acc. 6-22-31. Kind of Car, Line. Kind Acc., PL. Name of Driver, Mrs. Mary Eddy.

Claim No. 25853. Policy No. 627670. Date Acc. 6-22-31. Kind of Car, Line. Kind Acc., PL. Name of Driver, Albert Eddy Sr.

Claim No. 25854. Policy No. 627670. Date Acc. 6-22-31. Kind of Car, Line. Kind Acc., PL. Name of Driver, Mrs. Albert Eddy Jr.

Claim No. 25855. Policy No. 627670. Date Acc. 6-22-31. Kind of Car, Line. Kind Acc., PD. Name of Driver, Albert Eddy Sr.

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

AT 1-16-32 GK.

[Endorsed]: Filed U. S. Dist. Court, 2/10/33.

[Endorsed]. Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

WITNESS continuing: There were no losses reported or any claims made under those first two policies based upon [35] anything other than the combination automobile policy.—There were no claims made under the insurance feature. I did not

[Testimony of E. H. Payne.]

make any other application for any of the policies which have been referred to in my previous testimony, other than the applications which were verbal, to which I have referred. The rates on the renewal of these policies varied because of the variation in insurance rates generally, and each new policy, when issued, was issued upon the basis of the rates then prevailing. The adjustment of each of the losses referred to, upon the card which has been admitted in evidence here, was handled by me for Dr. Carfagni through the loss department of the National Union. All of the policies to which I have referred were kept in my possession permanently. None of those policies was delivered out of my possession or into the possession of Dr. Carfagni. The very next morning, after the accident occurred, as a result of which Mrs. Eddy died, I communicated with the National Union Indemnity Company. I talked with the claims manager at that time. When the accident occurred, which, I believe, was around the hour of 10 o'clock, Dr. Carfagni phoned my home, and I told him that I would be down to the police department in the morning and get the record of the loss and report it to the company. I met him at the office of the police department and got the complete record, and from there I went to the loss department in the office of the National Union Insurance Company and laid it before it. They immediately told me that they would take care of it. The National Union loss department sent

[Testimony of E. H. Payne.]
their representative to the police department and secured the car from it and took it to Larkin & Company. They phoned to me and said they were getting bids on repairing the car; later they phoned me and asked if it was all right if Larkin did the work on the car, and I told them "Yes". About a week later Larkin phoned me and asked me if I would get the company to release the car. [36] —They told me that the work was completed, and I phoned the company and then they told me they were denying all liability in this case and would not pay the claim, would not release the car, had not suggested that the car be sent to Larkins for the purpose of having the work done. The bill for that work was not paid by the company. Dr. Carfagni paid it, and then the car was released into his possession.

It was about a week after June 22, 1931 that I was first advised by the National Union Indemnity Company that they denied or would deny liability under this policy. During that intervening week, I had not received any word or information from anyone to the effect that the company was denying or would deny liability under the policy. At no time prior to the time that I heard that the company was repudiating or intended to repudiate its responsibility under the policy did I ever have any conversation with Mr. Sullivan or anyone connected with the National Union Company or either of the companies mentioned in this policy concerning

[Testimony of E. H. Payne.]

whether or not Dr. Carfagni had ever had any insurance refused or cancelled to him. With reference to these policies, the policy of 1929, the one of 1930 and the one of 1931, and particularly with reference to No. 9 on the policy reading as follows: "No company has cancelled or refused to issue any kind of automobile insurance for the assured during the past three years, except as follows:", I never at any time gave any answer to any question of that kind from anyone. I never at any time gave any answer to that question or to any similar questions, to the extent that there were no exceptions, or that no insurance had been cancelled or refused to Dr. Carfagni. That question had never been asked of me, and the subject matter of it was never discussed. The premiums were paid on the three policies issued by National Union Indemnity Company to Dr. Carfagni. [37]

Redirect Examination

I was never appointed an agent of the National Union Indemnity Company, no more than any other company. I was an insurance broker in 1929, 1930 and 1931, and as an insurance broker, I placed automobile policies and other policies in various companies, and from those companies I deducted a commission as broker. I followed the same practice with the National Union Indemnity Company. I procured these three policies from the National Union Indemnity Company that counsel has referred to,

[Testimony of E. H. Payne.]

at the request of Dr. Carfagni. After the policies were issued, they were delivered to me and retained in my possession. Dr. Carfagni had access to them, at his request. At any time he wanted, he could come in and see them. My testimony is that the first policy in 1929 was secured through a Mr. Phil Sullivan. Plaintiffs' Exhibit No. 2 does not refresh my recollection that I got that first policy through the firm of Leo Pockwitz Co. Inc., agents. That insurance was given by me directly with the National Union Insurance Company. I did not, that I can recall, place that first policy through Leo Pockwitz Co., Inc. General Agents. I think I could prove that that policy was placed directly with the National Union Insurance Company. I may have had dealings with the firm of Leo Pockwitz Co. Inc. in the year 1929. I might have called upon Mr. Pockwitz pertaining to other lines of insurance, not pertaining to this. I would not have any reason to call on him for National Union. I do not recall ever having had a telephone inquiry of Miss Hearney of Pockwitz, concerning the first policy. Not that I can recall was any inquiry made of me at the time the first policy was issued, concerning the fact that the car was purchased in October, 1928, and the insurance was asked for in 1929. When I got the first policy, I was familiar with the form of policy. With reference to section 9 of the policy, "No company has [38] cancelled or refused to issue any kind of automobile insurance for the assured during the past three years,

[Testimony of E. H. Payne.]

except as follows:" with "No Exceptions" in typewriting, that was the standard form. That is not customarily required to be answered by the company. I knew what exceptions meant. It meant that that application was never signed by me or by Mr. Fred Carfagni. The statement "No Exceptions" means that there are no exceptions. That is just what it says. The way it is written in, Dr. Carfagni had never been cancelled out by any company during the past three years. I took that policy in 1929 and kept it in my office. In 1930 I renewed it and got another and kept that for a year. In 1931 I got the third one. During that period of time, the National Union Indemnity Company never asked for any new information. So far as I know, the renewals were made upon the same state of facts that had existed at the time the first policy was taken out. Each policy contained the expression in section 9 here "No Exceptions". Not only did I handle the procuring of insurance as an insurance broker for Dr. Carfagni during the three-year period from 1929 to 1931, but I also took charge of the reporting of claims and the adjusting of losses for him.

Recross Examination

I recall definitely taking the matter up originally with Mr. Sullivan. Dr. Carfagni had the right to look at the policies at any time that he wanted to, but I have no recollection of his ever looking at any of the policies. I have on many occasions read the

[Testimony of E. H. Payne.]

policies, but the "No Exceptions" is written in 95% of the policies issued and, therefore, has never, to my knowledge, been used as an exception in insurance. I have been in the insurance brokerage business for twenty-seven years.

Further Redirect Examination.

I said that these three policies here that I took out with the National Union are standard form policies. I have [39] already testified that "No Exceptions" was in each policy, but not pursuant to any information or statement given by me at any time.

Further Recross Examination.

When the three policies issued by the National Union Indemnity Company to Dr. Carfagni reached my office, and during the time they were at my office, I read part of the policy pertaining to the kind of car, the engine number, the man's name, his address, which are very important points in the policy. I did not on any of those occasions, and relative to any of those policies read the so-called declarations and the filling-in after these so-called declarations, particularly declarations 8 and 9 on the policy. No attempt was made by the National Union Insurance Company, either the indemnity or the fire insurance company, after the so-called Eddy accident or prior to that accident to return any of the premiums on any of the policies issued prior to the policy issued under date of June 1, 1931. No money was offered or returned except the last policy that was issued. A week or so after the accident the premium was returned or offered to be returned.

EDWARD A. ARMSTRONG,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

I am in the employ of the State of California with the Division of Insurance, commonly known as the Insurance Commissioner's Office. I am serving there now as a statistician, particularly in connection with the receivership of the Home Accident Insurance Company. The full name of the company that is in receivership, and for which I am now acting for the Insurance Commissioner of the State of California is Home Accident and Home Fire Insurance Company of Little Rock, Arkansas. As receiver in California of that company, we have [40] in our possession original records of the business that they transacted in California. The records are stored and under my control. I have not the complete file upon Dr. Fred R. Carfagni, 580 Green Street, San Francisco, but I have some papers here relative to the business he transacted with the concern at the time it was a going concern. I have the papers which are headed by a daily report. The papers that I have handed to you, pasted together under policy No. C. A.-14575, Daily Report, are from the company's original records in my possession.

Mr. SUPPLE: We will offer, if your Honor please, in evidence, for the purpose of identification at this time, a number of papers pasted together and headed by policy No. C. A.-14575, Home Fire

(Testimony of Edward A. Armstrong.)

Accident Insurance Companies of Arkansas, Daily Report, name of insured, Dr. Fred R. Carfagni, 580 Green Street, San Francisco, Occupation, Dentist.

(Said papers were thereupon marked "Defendant's Exhibit B for identification")

WITNESS continuing: I have also in my possession and here in court certain sheets from the record of the Home Accident Company, one of them, name E. H. Payne, Address 306 Balfour Building, Folio No. 1, and on the reverse side, Folio No. 2. (The documents last referred to were offered for identification and marked as Defendant's Exhibit C).

WITNESS continuing: I have also produced here in court a paper marked "San Francisco Office Written Bordereau" dated 7/28, Com. 35 per cent, No. 652. (Said paper was offered for identification and marked as Defendant's Exhibit D)

WITNESS continuing: I have also produced a paper marked "San Francisco Office, Return Premium Bordereau" dated 8/28, No. 220, Com. 35 per cent. (Said paper was offered for identification and marked as Defendant's Exhibit E) [41]

C. A. CULPEPPER,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

My home address is in the North. I am in the casualty insurance business. I am agency supervisor. In the year 1928 I was branch manager for the Home Accident and Home Fire Insurance Company of Arkansas. As branch manager, I was looking after the business of the company in northern California principally. I had charge of the underwriting and all risks written in northern California passed over my desk. I approved of those risks as manager.

(The witness was here handed Defendant's Exhibit B for identification and held the same while testifying) I have seen similar documents to Defendant's Exhibit B for identification, but I don't know whether I have seen it before or not. I notice the handwriting on the report marked "Confidential, Dr. Fred R. Carfagni, San Francisco, California, 580 Green Street, Dentist". (Said report is a part of Defendant's Exhibit B for identification) I see the word "Cancelled" written on that page. I don't know in whose handwriting that is, but it looks like mine. I could not say, however, that it is my handwriting. In the year 1928 it was one of my duties to read these confidential reports. It was my invariable practice, as the manager of the company, after reading that report, if the risk was to be rejected, to write "Cancelled" on it and send it out to the girl to cancel. I think that is my

(Testimony of C. A. Culpepper.)

handwriting "Cancelled" but that is a long time ago. I am sure that the form of receipt-stamp used by my company is the form on that record. The date of it there is August 10, 1928. Looking at this entire Exhibit for Identification No. B, I can say that these records were my records as manager of the Home Accident Company in the year 1928. [42]

Mr. SUPPLE: We will offer them in evidence, your Honor.

Mr. BARRY: I urge the objection that they are immaterial, irrelevant and incompetent; that if they are for the purpose of showing cancellation, may it please your Honor, they do not show it; if they are for any other purpose, they are entirely immaterial, because this case is not being tried upon so-called confidential reports received by the Home Accident Company, and the only pertinency of the whole matter is whether the Home Accident Company did cancel the policy of insurance at or about the time already mentioned.

The COURT: Overruled; exception.

(Plaintiffs' Exception No. 2.)

Mr. BARRY: Has your Honor seen these statements, as far as the subject-matter of them is concerned?

The COURT: No, but I will admit them. (Thereupon Defendant's Exhibit B for Identification was marked in evidence as Defendant's Exhibit B).

(Testimony of C. A. Culpepper.)

DEFENDANT'S EXHIBIT B

Carfagni 14575

Return Receipt.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

F. R. CARFAGNI.

(Signature or name of addressee.)

.....

(Signature of addressee's agent.)

Date of delivery, 8/11/28.

Government Printing Office

Form 3811 c5—6116

Standard Forms Bureau Form 88 A Jan. 1918.

Copy

Cancellation Notice at Company's Election

(Mailed from) San Francisco, California, (Date) August 10th, 1928.

To Dr. Fred R. Carfagni

580 Green St.

San Francisco, Calif. Registered Letter

You Are Hereby Notified that this Company has elected to cancel its Policy No. 14575 issued to Dr. Fred R. Carfagni, loss, if any, payable to Assured, written to cover $.....on 1922 Lincoln Coupe at San Francisco, Calif. from 7-27-28, and that Five days from the date of service of this notice, said

(Testimony of C. A. Culpepper.)
policy, and the whole thereof, including the Mortgage Agreement, if any, will stand cancelled without further notice, and thereafter be null and void, and no liability will exist thereunder.

You are further notified that in event of the premium having been paid, the unearned portion thereof will be returned on surrender or relinquishment of said Policy.

HOME FIRE & ACCIDENT
INSURANCE CO.
(Name of Insurance Company.)
By .....Agent.

Trade Mark—Standard—88 A Jan. 1918.

Type of Body, Coupe

Carfagni, Fred R. Dr.
San Francisco, Calif. 580 Green St.
Dentist

Confidential

1—A. About how long have you personally known assured? A. ——

B. Or, about how long have your informants known him? (If less than two years, what was his previous address?) B. 6 years, 4 years.

C. About how long since you or your informants have seen him, or heard directly of him? (If not within two weeks, explain fully.) C. Daily.

2.—About what is his age? 35.

(Testimony of C. A. Culpepper.)

3—A. What is his racial descent? (Answer whether Anglo-Saxon, Greek, Hebrew, Italian, Negro, etc.) A. Italian.

B. If foreign-born, does he speak and understand English well? B. Yes.

4—A. In what line of business is he engaged? (If more than one, state all.) A. Dentist.

B. With what company, partnership, or individual is he connected? B. Self.

C. What position does he hold? C. Operator.

5—A. About how long has he been in his present business connection? A. Several years.

B. Is he regarded as successful in business? (If not, why?) B. Yes.

6—A. About what would you estimate his gross worth? A. $25,000

B. About what would you estimate his gross annual income? B. $6,000

7. Is his general reputation as to character, habits, and morals good? (If not good, state nature of reports against him.) Yes, see remarks.

8. Is he the owner of the automobile described above? Yes.

9—A. Does he drive the automobile himself? A. Yes.

B. Is he a capable driver? B. Yes.

C. Has he a reputation for fast and reckless driving? C. Yes.

D. Does he drive car while intoxicated? D. No

(Testimony of C. A. Culpepper.)

10. Do you learn that he has had any automobile accidents? (If so, give number and details in "Remarks.") No.

11—A. Has he any physical deformity, or material impairment of his eyesight or hearing? (If so, give details in "Remarks.") A. No.

B. Is he given to extreme nervousness or excitability? B. No.

12—A. Do others drive the car? (If so, state whether children, relatives, friends, or chauffeur. If children drive, give their approximate ages.) A. No.

B. Does the use of car by such persons increase the hazard of accident? (If so, give details in "Remarks.") B. ——

13. Is the car rented or used to carry passengers for a consideration? No.

14. Is he or anyone who uses car suspected of selling or transporting liquor? (If so, state whether selling or transporting. Give details in "Remarks.") No.

15. Would you recommend that a company assume the legal liability for any damage done to persons or property by this assured's car? No, see business record.

16—A. Remarks: Describe the uses of the car and cover its likelihood of causing injury, or being damaged. If others drive, give details.

(Testimony of C. A. Culpepper.)

The assured uses the car for pleasure and business. He is a capable driver and has had no serious accidents that informants know about. He drives at a fast and often at a reckless rate of speed, however, and has been arrested a number of times for speeding. The last time was about four months ago when he was on his way to Los Angeles. He was driving this car at the rate of about seventy miles per hour when he was stopped and arrested by a traffic officer on the highway. He keeps the car securely garaged when it is not in use.

B. Give a full statement describing assured's business; reputation; home surroundings, and community in which he lives.

He is the proprietor of a good sized dentistry business. The assured does a cheap grade of dentistry, specializing in gold work, for which he charges a high price. He operates in the Italian business district and has a good trade and keeps two or three assistants working most of the time. He does a large business with local dental supply houses, but his personal attitude has forced two supply houses to discontinue his business and a third one holds him with a great deal of skepticism. He enters the sales room with a rough pugnacious attitude and he is a hard man to bargain with. He ran ac-

(Testimony of C. A. Culpepper.)

counts with two houses, and even though he had the money to pay the accounts he passed (over) them off as a trifling matter. One place where he traded suspected him of being dishonest. When he came into the sales room one of the men, out of sight of the assured, watched him and saw him pick up some tools and keep them without paying for them. The assured is not an excessive drinker and his moral reputation is not criticized. He lives with his wife in a desirable residential section.

Note: This information was confirmed through reliable sources. S3

Automobile Liability Report

Date..... 192.....

Signature of person making report .....

Hereby binds insurance as described in Schedule of Coverage herein for a period of.....days beginning at noon on the .....day of....., 192....., and ending at noon, ... day of ....., 192....., on the following described automobile.

Warranties.

The following are statements of facts known to and warranted by the named Assured to be true by the acceptance of this Binder, and this Binder is issued by the Companies named above relying upon the truth thereof:

1. Named Assured—Part I 14575—Dr. Fred Carsagni

   Part II .....

(Testimony of C. A. Culpepper.)

2. Address _____
No. St. or Ave. City or Town County State
3. Occupation or business is _____
Name and address of Employer, if any.
4. The named Assured is _____
Individual co-partnership, corporation, receiver, trustee, or estate.
5. The description of the automobile and the facts concerning its purchase are as follows:

Trade Name; Model; Year; H. P.; No. Cyl.; Type of Body, If Truck, State Tonnage; Serial Number; Motor Number; Factory List Price; Actual Cost to Assured; Purchased by Assured, Month Year New or Second-hand.

6. The automobile described is fully paid for by the Assured and is not mortgaged or otherwise incumbered, except as follows: _____
Unpaid balance or incumbrance, if any, $_____ payable in _____ Number of months _____
Amount of Each payment.
7. Subject to all the stipulations, provisions, and conditions of Part I of this Policy, loss, if any, under said Part I, shall be payable to _____ as interest may appear.
8. The uses to which the automobiles described are and will be put, are: _____
9. Said automobiles are and will be principally maintained and garaged in the city or town of _____ and will be principally used in the city or town of _____ and its vicinity.

(Testimony of C. A. Culpepper.)

10. None of said automobiles are or will be rented to others or used to carry passengers for a consideration, or for demonstrating or testing purposes, except as follows: _____

11. No automobile described herein is or will be used for towing or propelling any trailer or any other vehicle used as a trailer except as follows: (Incidental assistance to a standard automobile on the road is permitted) _____

12. No company has canceled or refused to issue any kind of automobile insurance for the named Assured during the past three years, except as follows: _____

13. The automobiles covered hereby are owned exclusively by the named Assured, except as follows: _____

14. Name of front bumper _____
Name of rear bumper _____
Name of locking device _____

Schedule of Coverages

Policy Secs.	Perils
A & B	Fire, Lightning, Transportation
C	Theft
D	Collision
E	Collision, Limited Coverage
F	Theft Extra Equipment
G	Tornado, Hail, Explosion, Earthquake, and Accidental Discharge of Water
H	

(Testimony of C. A. Culpepper.)

I Public Liability

J Property Damage

K

Rates and Limits of Liability

Amount of Insurance, $.....@ $.....per $100.00

Amount of Insurance, $.....@ $.....per $100.00

Amount to be deducted from each separate claim ..... $.....

Amount deductible as per Section E of the "Perils Insured Against" .....

Amount of Insurance, $.....@ $.....per $100.00

Amount of Insurance, $.....@ $.....per $100.00

Premium Charges

Gross	Reductions	Net
	For Fire Ext'g'sher	
$	$	$
	For Locking Device	
$	$	$
	For Bumper(s)	
$	$	$
	For Bumper(s)	
$	$	$
$	$	$
$	$	$
	$	$

Total Premium Part I $

(Testimony of C. A. Culpepper.)

Limit "For one person" as defined in Paragraph (1) of the Limits of Liability .....
.....Dollars ($.....)

Limit "For one accident" as defined in Paragraph (1) of the Limits of Liability .....
..... Dollars ($.....)

Limit of liability of Company on account of any one accident is ..... Dollars ($.....)

Total Premium Part II $

Total Premiums Parts I and II $

This Binder is subject to the terms and conditions of the said Companies' Combination Automobile Policy of said insurance as above described in current use at the time this Binder becomes effective, and shall be void immediately upon the issue of the Policy or upon written notice to the Assured that the risk is not accepted by the Companies, or if any agent or other representative of said Companies, or any other person except the President, Vice-President or Secretary of the Companies has changed or waived any clause or condition of the said policy form or waived any part of this Binder.

If the risk is accepted by the said Companies, the policy will be for one year and bear even date with this Binder; if the risk is not accepted by the said Companies or the policy is refused by the Assured, the Assured shall pay an earned premium at the

(Testimony of C. A. Culpepper.)

rate named herein pro rata for the period this Binder has been in force.

Countersigned at....., this..... day of..... 192.....

E. H. PAYNE, Agent.

Home Fire Accident Insurance Companies
Of Arkansas
DAILY REPORT

Policy No. CA—14575

Series 2, October, 1927

Number of Previous Policy New

Col.; Make; Use ; Car Yr.; Lim; Cov., 1; Kind, Y; Biz., O;Ter., 1.

Statement 1. The Policy period is 12 months from July 27th, 1928, to July 27th, 1929, commencing at twelve o'clock noon, standard time, as to both dates at the Assured's address set forth in Statement 2 of this Schedule.

Statement 2. Name of Assured. Part I. Dr. Fred R. Carfagni. Part II Dr. Fred R. Carfagni. Address of Assured (Street and number, city or town, and State) 580 Green Street, San Francisco, California.

Statement 3. The Assured's occupation, profession, or business is Dentist.

The Assured's firm or employer is —— and the Assured is (Individual, copartnership, corporation, trustee, or estate) Individual.

Statement 4. The description of the automobile and its equipment to which this insurance relates, is as follows:

Trade name, Lincoln; Model —; Year, 1922; No. Cyl., 8; Type of body (if truck, state ton-

(Testimony of C. A. Culpepper.)

nage) Four Pass. Coupe; Serial Number, —; Motor Number, 3965; Factory List Price, $3900.; Actual Cost to Assured, $5650.; Purchased by Assured, Month, 7; Year, 22; New or Secondhand, New.

Equipment for which credit in premium is taken: Front Bumper —; Rear Bumper —.

Statement 5. The automobile described is paid for in full by the Assured and is not mortgaged or otherwise incumbered, except as follows:

Unpaid balance or incumbrance, if any, $——, payable in —— months, $..... (Amount of each payment)

Statement 6. Subject to all the stipulations, provisions, and conditions of Part I and Part II of this Policy, loss, if any, under Sections A and/or B and/or H, shall be payable to Assured as interest may appear.

Statement 7. The automobile described is and will be used only for business & pleasure excluding comm'l delivery.

Statement 8. The automobile described (a) is not and will not be rented to others or used to carry passengers for a consideration, actual or implied, (b) will not be equipped with a trailer, (c) is not and will not be used for demonstrating or testing purposes, (d) will not be specially equipped as Service, Trouble, or Emergency car, or used as such.

Statement 9. The Automobile described is, and will be, principally maintained, garaged, and used in the city or town named in Statement 2.

(Testimony of C. A. Culpepper.)

Statement 10. No company has refused to issue or renew, or has cancelled any automobile insurance of the Assured during the past three years.

Statement 11. There are no exceptions to Statements 8 to 10 inclusive, except as follows:.....
(Give full particulars, indicating numbers of Statements to which applicable)

Schedule of Coverages

The insurance granted by the Home Fire Insurance Company under Part I of this policy applies only to those sections of the Perils insured against for which a premium charge is made as indicated in the following Schedule of Coverages, subject to the specified amounts, limitations, and deductions stated therein, and also to all other terms, agreements, conditions, and warranties of Part I of this Policy.

The insurance granted by the Home Accident Insurance Company under Part II of this policy applies only to those sections of the Perils insured against under which the limits of liability and/or deductions are recorded and a premium charge made in the following Schedule of Coverages.

Any other coverages to be included under Parts I and II of this policy must be added by endorsement and the titles and premium charges therefor recorded under Sections E and K of the following Schedule of Coverages.

(Testimony of C. A. Culpepper.)

Part I. Home Fire Insurance Co.

Sec. A. Perils. Fire, Lightning, Transportation; Limits of Liability, Amount of Insurance $600.00; Rates, $.35; Premiums, $2.50.

Sec. B. Perils, Theft, Robbery, or Pilferage. Limits of Liability, Amount of Insurance, $600.00; Rates, $.35; Premiums $2.50.

Sec. C. Perils, Theft Extra Equipment. Limits of Liability, Amount of Insurance, $75.00; Rates, ...; Premiums $7.50.

Sec. D. Perils. Tornado, Hail, Explosion, Earthquake, Accidental Discharge of Water. Limits of Liability, Amount of Insurance, $.....; Rates, ...; Premiums, ...

Sec. E. Perils. Limits of Liability, Amount of Insurance, $.....; Rates, ...; Premiums, ...

Total Premium Part I, $12.50

Part II, Home Accident Insurance Co.

Sec. F. Public Liability. Limit for one person as defined in Clause (1) of Paragraph B of the Limits of Liability Ten Thousand & No/100 Dollars ($10,000.00). Limit for one accident as defined in Clause (1) of Paragraph B of the Limits of Liability Twenty Thousand and No/100 Dollars ($20,000.00). Premiums $46.80

Sec. G. Property Damage. Limit for one accident as defined in Clause (2) of Paragraph B of the Limits of Liability One Thousand & No/100 Dollars ($1,000.00). Premiums $12.00.

(Testimony of C. A. Culpepper.)

Sec. H. Collision Full. Amount deductible from each separate claim $..... Premium reduction for..... Bumper(s) is.....% $86.00

Sec. I. Collision, Limited Coverage. Available for Private Passenger Automobiles only $.....

Sec. J. Glass Damage. Subject to limit of liability for glass damage stated in Section J of the insuring agreements. $.....

Sec. K. $.....

Total Premium Part II $144.80

Total Premiums Parts I and II, $157.30

Countersigned at San Francisco, California, this 8th day of June, 1928.

E. H. PAYNE, S. F. CAL. (M. A.)
Authorized Agent.

Home Accident Insurance Company
of Arkansas
Established 1900
AMENDMENT OF LIMITS
Liability and Property Damage

In consideration of an additional premium of Three and 12/100 Dollars ($3.12), it is understood and agreed that the Company's Liability, regardless of the number of persons named as Assured hereunder, for an accident resulting in injuries to, or in the death of one person is limited to Fifteen Thousand & 00/100 Dollars ($15,000), and subject to that limit for each person the Company's total liability on account of any one accident resulting in injuries to, or in the death of more than one

(Testimony of C. A. Culpepper.)

person is limited to Thirty Thousand and 00/100 Dollars ($30,000.00).

In consideration of an additional premium of Included in Policy Premium ($.....), it is understood and agreed that the Company's liability for any accident resulting in the damage to or destruction of property is limited to One Thousand and 00/100 Dollars ($1,000.).

Anything in the policy to the contrary notwithstanding.

This endorsement to take effect at noon of July 27th, 1928.

Attached to and made a part of Policy No. CA-14575 of Home Accident Insurance Company & Home Fire Insurance Company, of Fordyce, Arkansas, issued July 27th, 1928 to Dr. Fred R. Carfagni of San Francisco, California.

C. D. KENESSON Secretary. A. B. BANKS President.

Countersigned at San Francisco, California. this 20th day of June, 1928.

.....Agents.

Not valid unless countersigned by a duly authorized agent of the company.

(Testimony of C. A. Culpepper.)

CANCELLATION SLIP

Home Accident Insurance Co.

Home Fire Insurance Co.

Policy No. 14575 Aug. 21, 1928

Dr. Fred R. Carfagni, Assured.

Date of Cancellation (Year) 28 (Month) 7 (Day) 27

Date of Policy (Year) 28 (Month) 7 (Day) 27.

Time in Force.

Total Premium (Home Fire) $12.50 (Home Accident) $147.92.

Earned Premium, Pro Rata, Short Rate $ $

Return Premium, Pro Rata, Short Rate $ $

Total Return Premium $160.42

Remarks Canc. Flat CO. Election.

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

Per K. M. H.

Cancel.

Received Aug. 10, 1928. Home Accident Ins. Co. San Francisco Branch.

128%.

39 4992

4680

---

312 AP

Send Endorsements.

Increase limit to 15/30 from date of issue.

15/30.

(Testimony of C. A. Culpepper.)

75 extra
equip

Correct
Policy

Fire	2.50
Theft	2.50
	5.00
Lia. 10/20	46.80
P. D. 1,000	12.
Null	
Coll.	86.
	144.80
	5.
	149.80

20.

Renew for E. H. Payne & return this application to his office.

R V

Retail Credit Report Ordered 8/8.

Jul. 14, 1928.

Prem..... Date..... Brokerage..... 7-26.

Bordereaux 652. Posted. Expiration.....Card. E.

(Testimony of C. A. Culpepper.)

TCCA

8-25

220

Coverage—1. K—Y. Business—O. Territory—1.

Jul. 14, 1928.

Prem..... 7-26. A. P. Date..... Brokerage ..... Bordereaux 652. Posted. Expiration..... .....Card.

Coverage—1. K—Y. Business—O. Territory—1.
Broker: Payne
Reg. Card Ret'd.

[Endorsed]: Filed U. S. Dist. Court, 2/10/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

WITNESS continuing: After looking at Defendant's Exhibit B, I will state that the Home Fire and Accident Insurance Company must have had an assured by the name of Fred R. Carfagni, Address 580 Green Street, San Francisco, California, Occupation, Dentist, because this is the daily report of it. When I say "this is the daily" I refer to a daily report on the first page of that Exhibit B. That is the broker's copy. That is our record of the policy that was issued covering 1922 Lincoln for fire and theft liability and property damage.

(Testimony of C. A. Culpepper.)

The date of that policy was July 27, 1928, and the number of it was CA-14575. After that policy was issued to him, it would have been delivered to Mr. E. H. Payne, the broker who placed the business with our office. The policy No. 14575 was written for a year, [43] July 27, 1928 to July 27, 1929. Evidently that policy did not expire. There is a cancellation slip here. That policy to Dr. Fred R. Carfagni was terminated by a registered notice to the assured, notifying him that the policy was cancelled, or would be cancelled in five days from date of notice. The cancellation notice to which I refer is made upon the reverse side of the exhibit. That was the standard form of cancellation that was used at that time. It was sent by registered mail to Dr. Fred R. Carfagni, and that is the return receipt for the registered letter. (It was here admitted by counsel for plaintiffs that the signature on the return receipt was that of Dr. Carfagni)

WITNESS continuing: In the practice of our office, we filled in the date of delivery 8-11-28, upon the return receipt when it was returned to us. The cancellation notice at company's election to Dr. Fred R. Carfagni, 580 Green Street, San Francisco, was directed to that address, postage prepaid, on August 10, 1928. That cancellation notice was mailed after being truly directed with postage prepaid. That was our invariable procedure. When we served a notice of cancellation, at the company's election, upon the assured, such as Dr. Carfagni, it was our practice also to give the broker who

(Testimony of C. A. Culpepper.)

placed the business, a copy of the cancellation notice. The notice pasted to Exhibit B was made in triplicate. That notice is sent to the assured, the broker, and one copy for our record. The mark "Cancelled Flat Co. Election" upon the cancellation slip attached to Defendant's Exhibit B means it is cancelled back to date of issuance. "Cancelled flat" means with no premium being charged. I don't know whether there was any premium paid for that policy or not. When we cancel a policy flat, it means there is nothing charged to the assured, and there is no unearned premium paid back. It is just wiped out. If the policy has been in existence for some time, there is no premium charged at all. In other words, [44] we in effect carry it from the time of the issuance of the policy until the cancellation without premium.—It is hard to collect small premiums, and the company would rather waive it than go to the expense of collecting it. There was no premium paid down at the time of the issuance of the policy. There never is.

Mr. SUPPLE: Q. Now, you cancelled the policy of Dr. Fred R. Carfagni. I will ask you to look at Defendant's Exhibit B and tell his Honor the reason for your cancellation.

Mr. BARRY: I urge the objection that it is immaterial, irrelevant, and incompetent, and cannot possibly have any bearing on the issues of this case, and the reason why the Home Accident acted means nothing unless the policy issued in 1931 and upon which this action was based had some reference to

(Testimony of C. A. Culpepper.)

the reason for the prior cancellation; in other words, I cannot see why the action of the Home has any bearing, or how it could have any bearing in this case, except it had some reference to the reason for the prior cancellation.

The COURT: I think that is true. Of course, I will assume you had good reason for doing it.

Mr. SUPPLE: That is not sufficient, as I read the authorities which I can cite to your Honor. The proposition is this, that in a breach of warranty such as here alleged for a cancellation, it is in some of the cases said that a cancellation, for instance, for non-payment of premium is not material, but that if you have a cancellation for a bad risk, for instance, then it does become material in the inquiry upon the breach of the warranty.

The COURT: Objection overruled; exception.

(Plaintiffs' Exception No. 3)

A. This risk was evidently cancelled because the report indicates reckless driving and was arrested a number of times for speeding, very bad automobile coverage from the company's [45] standpoint. Is that enough?

Mr. SUPPLE: You might answer, Mr. Culpepper, as to your reasons for cancelling out Dr. Carfagni.

The COURT: The reasons are right there, are they not?

A. The reasons are there.

Q. Are they there on the report?

A. Yes.

(Testimony of C. A. Culpepper.)

WITNESS continuing: If I saw this particular confidential report, I would have cancelled the risk; I cannot remember it.

The COURT: He has already testified that the word "Cancelled" is in his handwriting.

WITNESS continuing: I would have cancelled out Dr. Fred R. Carfagni, 580 Green Street, as a bad risk. I could not say definitely that I did so. When you say I did it, I don't know; the office did it. I did not say that the word "Cancelled" was my writing. I said it looked like it.

The COURT: That is sufficient.

WITNESS continuing: It was the practice in our office if the risk was to be cancelled, I would mark "Cancelled" on the file; that is on the confidential report, and attach the daily report, that record of the policy you have there, and send it out to the cancellation clerk to either get the policy back or to mail a cancellation notice direct.

Cross Examination.

I don't know whether the date, August 21, 1928, printed on the cancellation slips, which are a part of defendant's Exhibit B is the date it was actually cancelled or the date that the cancellation was put through the books. It would either represent the date that the cancellation was made or the date that the cancellation was put through the books, allowing a credit for the premium. The time that was taken in the matter of having the cancellation go through the books and having the credit given [46]

(Testimony of C. A. Culpepper.)

in the manner indicated by me depends upon the policy of the accounting department; sometimes they let them stack up and then enter the cancellations at different intervals instead of as each cancellation coming in being entered on the books. This cancellation slip does not give me any information as to the actual date that the policy was cancelled upon the books of the company, but the cancellation notice would. The cancellation notice gives me information as to the correct date of the cancellation, the correct date of terminating liability. According to law, the cancellation would not become effective and did not become effective in this case until five days after that notice was mailed. Five days after the date of the notice, the company's liability is terminated, regardless of whether it goes through the books or not. It would be five days from the date of the service of notice.—That would be the 15th in that case, assuming that the 10th was the date upon which it was mailed out.

It appears from the binder, which is part of the exhibit in evidence as Defendant's Exhibit B, that the limits were increased to $15,000 and $30,000. I don't know what they originally were. They were increased from what they originally were to $15,000 and $30,000. This "binder" was not the form of binder that we used. It evidently was an order from the broker to increase the limits to $15,000 and $30,000. There is no record in the file that I have before me (referring to Defendant's Exhibit B) that there were two policies issued to Dr. Carfagni. There

(Testimony of C. A. Culpepper.)

is not a policy upon a $10,000 and $20,000 basis, and later a policy upon a $15,000 and $30,000 basis. I should think it would be increased by endorsement, if the policy had been issued. It is not necessary to issue another policy. This binder was not a memorandum given at the time the policy was applied for, but it indicates a change of coverage after the policy had been issued. I could not say in whose handwriting the document is. I do not know. [47]

The Home Company and the National Union Indemnity Company were non-board companies at that time. I don't know whether or not our company was a member of the Insurance Credit Clearance Association at that time. I knew that there was an institution known as the Insurance Credit Clearance Association at that time. The Association did not serve hardly any function; it was more of a luncheon club, where the managers congregated once a month and were supposed to discuss their problems and also to give information relative to doubtful risks, risks that had been refused by each other. As a matter of fact, I believe we notified each other of risks that were cancelled. We were supposed to, some of them did, and some of them did not, according to whether they felt like it or not. The representatives of the different non-board companies, which belonged to the Insurance Credit Clearance Association, were pretty slack giving to one another information concerning risks cancelled because they were bad risks. That was one of the purposes of the organization. At the time that a policy was cancelled, by a member of the Associa-

(Testimony of C. A. Culpepper.)

tion, because it was a bad risk, that member did not advise the other companies who were members of the Association of such cancellation. We advised the Clearing Bureau, and the Clearing Bureau in turn was supposed to pass the information out. It was supposed to advise the other companies that the risk had been cancelled. Lots of times it did, and sometimes it did not. When I say the other companies, I am referring to the other companies that were members of the Bureau, and that were non-board companies.

There were several companies which made reports like the Retail Creditors Association made for us on Dr. Carfagni. They were Hooper Holmes Bureau, Retail Credit, Bradstreet. I don't know what other companies. This Home policy was cancelled by our company after we had received a report from the Retail Credit Association. The report to which [48] I referred is the report which is a part of Defendant's Exhibit B. The mailing out of cancellation notices and details of that kind was not handled by me, but by others in our office, who were under my general direction. I did not check up in each individual case, in order to answer as to what was done with a cancellation notice in that particular case; there was a method of checking, but I did not do it personally.

Redirect Examination.

Our company was not a member of the Retail Credit Association. We ordered the report from which we decided to cancel out the risk from the

(Testimony of C. A. Culpepper.)

Retail Credit Company. When I say that "we ordered it", I mean the Home Company ordered it. You will notice on the daily there is a capital "R" in blue pencil, which means "Retail Credit Report" is to be ordered. I can identify that "R" on the daily report of defendant's Exhibit B. That is my "R". I ordered retail credit reports for the cases which I wanted them in. I know Mr. Havens in the Home office here in San Francisco was the cashier and bookkeeper, and part of his duties was to oversee the cancellations.

H. R. HAVENS

called as a witness on behalf of defendant, being duly sworn, testified as follows:

I reside at 147 Hernandez Avenue, San Francisco. I am in the insurance business. I was in that business in August, 1928 and was connected with the Home Accident and Home Fire Insurance Company of Arkansas. My duties, among other things, working for that company were cashier or bookkeeper, cancellation, collection of accounts, etc. One of my duties was to supervise cancellation of accounts. As far as I know, I was acting as cancellation supervisor on or about August 10, 1928. (The witness is here shown Defendant's Exhibit B and examines the same.) I have examined Defendant's Exhibit B and have looked upon the reverse side of the [49] exhibit to a paper marked "Cancellation Notice at Company's election." It was one of my duties to

(Testimony of H. R. Havens.)

supervise the sending of such notice to a risk which was cancelled. No doubt I had sent this one out. All of them came through over my desk. I will describe the procedure, how we did this. Mr. Culpepper would order the policy cancelled; it would come to my desk, and I would have a girl make out three copies of the cancellation notice, such as here. The original, as I remember, was just folded over and had a couple of corners, we could seal it on the side, and we would send it out with a request for a return receipt; it would be given to the mailing boy, who would have it registered, and one copy would go to the assured, and one copy to the broker, and we would keep one copy for our file. I would say that that was the practice that we followed there invariably. This present notice of cancellation to Dr. Fred R. Carfagni was duly directed. The cancellation notice was mailed to the address given on the policy. The postage was then prepaid, and it would be mailed. As far as I know, I had charge of all of them, and I suppose this was one. As far as I know, it was the postman who inserted the date of delivery in that return receipt of the United States Mail. We did not do it at the office.

FRED R. CARFAGNI,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

I am Dr. Fred R. Carfagni. My address on August 10, 1928 was 580 Green Street. (The witness here looks at the return receipt attached to

(Testimony of Fred R. Carfagni.)

Defendant's Exhibit B). That is my signature on the return receipt attached to Defendant's Exhibit B. If I received the letter that accompanied the return receipt, I turned it over to my broker immediately. I must have received the letter that accompanied the return receipt, because I signed for receiving a letter, and I turned it over immediately to my [50] broker. Evidently the return slip states when I got the letter which accompanied it. I turned the letter over to my broker, but I first opened it and saw what it was. I must have noticed that it was a cancellation notice. I think my broker called the next morning, because he received a cancellation notice also.

MISS HELEN HEARNEY

called as a witness on behalf of defendant, being duly sworn, testified as follows:

I am employed by General Insurance Company. At the present time my vocation with the company is stenographic work. In June, 1929, I was automobile underwriter for Leo Pockwitz Company. As automobile underwriter for that company, we had business dealings with a broker named E. H. Payne. I have with me the office record of Leo Pockwitz Company on or about June 1, 1929, regarding the risk written for Dr. Fred R. Carfagni. (The witness here produces said office record) I secured the office record from Leo Pockwitz Company. In 1929 Leo Pockwitz Company were general agents for the National Union. Mr. Phil Sullivan was not employed by Leo Pockwitz Company, and

(Testimony of Miss Helen Hearney.)

he was not in that company at all. My recollection of who placed the risk of Fred R. Carfagni is that I received a telephone call from Mr. Payne placing the insurance on this particular car. This office record of Leo Pockwitz Company that I now hold in my hand shows E. H. Payne as having placed the insurance with Leo Pockwitz. After we got the order for the insurance, our practice regarding make-up of the daily report or policy was that when I was satisfied that the risk was in order, I wrote up the policy. I wrote up this particular policy while I was with Leo Pockwitz. (The witness was here shown Plaintiffs' Exhibit No. 2). I have a copy of the policy marked Plaintiff's Exhibit No. 2 in my hand. I delivered the policy marked Plaintiffs' Exhibit [51] No. 2 to Mr. Payne, and a copy of the policy was sent to National Union. The number of the policy which I wrote for Dr. Fred R. Carfagni on June 1, 1929 was 622599.

Mr. SUPPLE: We offer in evidence, if your Honor please, as defendant's exhibit next in order, a paper which has been identified as a daily report prepared by the witness for Leo Pockwitz Co. Inc.

The COURT: That is the first policy issued by your company?

Mr. SUPPLE: Yes, and the purpose is, there has been testimony from Mr. Payne that he went to Mr. Phil Sullivan first and got the policy from Mr. Sullivan.

Mr. BARRY: That is, he placed the application with Mr. Phil Sullivan.

(Said daily report was thereupon received in evidence and marked Defendant's Exhibit F.)

(Testimony of Miss Helen Hearney.)

DEFENDANT'S EXHIBIT F.

Folio No. 5503I. Policy No. 622599

Agency San Francisco, Cal.

Combination Automobile Policy

National Union Fire Insurance Company

and

National Union Indemnity Company

Pittsburgh, Pa.

Declarations

Leave this space blank

Amount	Premium	Make
F		
T	Age	
C		
	N-SH	
Tor		
SI	Col.	
CV		

E. H. PAYNE

1. Name of Assured Fred R. Carfagni
2. Address of Assured 580-Green Street, San Francisco, California.
3. Assured is—(Individual, Co-partnership, Corporation or Estate) Individual.
4. Assured's occupation or business is—(State in Full) Dentist.
5. This policy shall be in effect for a period of twelve (12) months from 12 o'clock noon, standard time at assured's address June 1st,

(Testimony of Miss Helen Hearney.)

1929 to 12 o'clock noon, standard time at assured's address June 1st, 1930.

6. The following is the description of the Automobile and the facts with respect to purchase of same.

Model Year 1929. Model No. or Letter. Trade Name Lincoln. Type of body (if truck, state tonnage) Sedan. Serial No. Motor No. 51834. Horse Power. ..... No. of Cylinders 8. List Price $..... Purchased by Assured, Month, Oct., Year, 1928, New or Second Hand, New. Actual Cost to Assured (including equipment) $5055.00. Is Automobile Fully Paid for? (Yes or No). Amount Unpaid $..... No. Unpaid Notes? Notes Payable Monthly (if not, state method of payment).

Subject to all the stipulations, provisions and conditions contained in this policy, loss, if any, is payable to Assured. as interest may appear (Give name of person, firm or corporation holding any encumbrance)

7. The above described automobile is and will be during the period of this policy, used for the following purposes Business & Pleasure.
8. The above described automobile is and will be during the period of this policy, principally used and garaged in the city named in Declaration 2, except as follows: No Exceptions.
9. No company has cancelled or refused to issue any kind of automobile insurance for the As-

(Testimony of Miss Helen Hearney.)

sured during the past three years, except as follows: No Exceptions.

The company shall be liable only under that section or those sections of the policy for which a specific premium charge is made below.

Amount of Insurance, $4000.00 (Insert either a specific amount or words "actual cash value.")

Part I—National Union Fire Insurance Company.

Sections 1 and 2. Fire and Transportation, Rate 20¢, premium $8.00.

Section 3. Theft. Credit allowed for locking device, rate 30¢, premium $12.00 (give name or insert word "None"), subject to locking device clause on page two.

Section 4. Tornado, cyclone, windstorm, hail, earthquake, explosion, accidental, and external discharge of water. Premium, nil.

Section 5. Collision or upset in excess of $ Full Cov. (insert "Full Coverage," "$50.00," or "$100.00" deductible according to coverage desired), subject to Collision peril clause on page two. Rate $50.00 extra equipment. Premium, $5.00, $102.00.

Credit allowed for Bumpers. (Give name, indicating "front," "rear," or "front and rear," or insert word "none"), subject to bumper clause on page two.

Part One, Total Premium $127.00

Part 2—National Union Indemnity Company

Section 6. Liability for bodily injuries or death

(Testimony of Miss Helen Hearney.)

(a) limit one person ($15,000.00); (b) limit one accident ($30,000.00) ..... Premium $55.04

Liability for damage to property of others (c) limit one accident ($1,000.00) Premium 13.00

Part Two, Total Premium 68.04

Total Premium, Part One and Two $195.04

Countersigned at San Francisco, Cal., this 5th day of June, 1929.

.....

Authorized Agent for both Companies.

Standard Forms Bureau Form 346 (Feb. 1919)

Loss Payable Clause.

Balance Due $1258.93

Loss, if any, subject to all the terms and conditions of this policy, is payable to Anglo California Trust Company.

Attached to Policy No. 622599 of the (Name of Company) National Union Fire Insurance Company issued to Fred R. Carfagni.

Agency at San Francisco, Calif., dated October 5th, 1929.

1929—Lincoln Sedan—Motor #51834.

LEO POCKWITZ CO. Inc.

Agent.

Trade Mark—Standard—346 Feb. 1919.

[Printer's Note: The following phrases and words are rubber stamped across the face of this form.]

Acct. Curr.

Jun 1929

(Testimony of Miss Helen Hearney.)

Entered Jun 1929

Expiration Jun 15, 1929.

[Endorsed]: Filed U. S. Dist. Court, 2/10/33

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

Cross Examination.

Leo Pockwitz Co. were general agents for the National Union in June, 1929. They wrote policies of insurance where applications would come in to them. I notice that on this particular daily (Defendant's Exhibit F), there is a loss payable clause, the only part of the document, upon which the name of Leo Pockwitz appears, and I notice the date of that loss payable clause. In connection with that loss payable clause, Leo Pockwitz Company were acting in the capacity of brokers. The rider in this policy, having the name Leo Pockwitz Company on it, was not ordered until October. With reference to the meaning of the rider, it may have been that the assured had taken out a loan on the car, and we were ordered to protect the equity at that time with the Anglo California Trust Company. It appears that in October, 1929, a loan was being taken out on the car, and we were [52] ordered to protect the equity of the Anglo California Trust Company. That is not the first part that Leo

(Testimony of Miss Helen Hearney.)

Pockwitz Company had in connection with that particular policy. This folio No. also indicates that Leo Pockwitz took it for the National Union. The serial number, folio No. 5503 was assigned and allotted to Leo Pockwitz. They always had it from the time I went with Leo Pockwitz. It always had the same folio No. 5503. That was the serial number of Leo Pockwitz Company with the National Union. That would mean that on each policy of that particular series that Leo Pockwitz issued or had any connection with, in so far as the National Union was concerned, that the policy would have the same folio number. With reference to the number of policies to a series, it all depends upon the class. That particular policy was a combination policy, and that had one serial, 5503. It all depended on what coverages were included in the car. Policies for fire and theft had a different serial. I have looked at the books of Leo Pockwitz to ascertain whether there was an entry made of a premium paid on or about this date. All I have in this matter is this document here. I got it from the Leo Pockwitz Company. I have not examined the books of the company to see whether there was any charge made to Payne at that time for this particular policy. I know that Payne did business with Leo Pockwitz Company at this paticular time, but I could not say the specific instances right now.

I recall his calling me up and asking for it. I could not give the conversation that I had with him at the time he called me up word for word. He

(Testimony of Miss Helen Hearney.)
called up and wanted to place the application for his insurance, and at the time I was taking it down, the name was most peculiar, and I sort of questioned that, and secondly, the date the car was purchased was in October, 1928, and our policy did not go into effect until June, 1929, and I questioned that, and Mr. Payne told me it was [53] all right, that there had not been any losses on it, and, therefore I issued that policy. I asked Mr. Payne whether there had been any losses from the time the car was purchased to the date the insurance was placed with our office. I have a distinct recollection of having had that conversation with Mr. Payne at that time. I really could not say how many policies I had to do with, or what business I transacted during the month of June, 1929, but I know our business relations with Mr. Payne were very few. I recall having a distinct conversation with him along the lines that I have testified to a moment ago. I said in my direct examination that I was satisfied the risk was in order, and then I issued the policy. I satisfied myself that the risk was in order by taking Mr. Payne's word for it. With reference to the risk being in order, Mr. Payne told me that the risk was all right; that it had not been cancelled out by any other company, and that it was in order for me to write it up. I am sure he told me that it had not been cancelled by any other company. I did not have any conversation before I took the stand today concerning the nature of the testimony that would be asked of me if I took the stand. No one said anything to me

(Testimony of Miss Helen Hearney.)

about my being called for the purpose of testifying concerning the conversation that I had with Mr. Payne before this policy was issued. I did not know until about an hour ago that I was going to come up.

I did not have anything to do with the renewal of this policy. I don't know who had to do with that. I do not believe that our office was acting as general agents of the company a year later. I could not swear positively as to that. Had the policy been renewed with us, it would have come through our office. If it were renewed with the National Union, we would not necessarily get the benefit of the business, if we were not the general agents. I have not the books of Leo Pockwitz Company [54] showing whether or not a charge was made against Mr. Payne or Dr. Carfagni in connection with this policy issued during the period from June 1, 1929 to June 1, 1930.

I know of a man by the name of W. Grady, who worked for the National Union, but I do not know him personally. I believe he was with the claims department of the National Union at that time. I believe his given name was Walter. The daily dated May 9, 1930 (Plaintiffs' Exhibit 3) issued by National Union to Dr. Carfagni was not issued out of our office. The policy dated May 13, 1931 (Plaintiffs' Exhibit 1) was not issued out of our office in 1931. I had no conversation with Mr. Payne after the original policy was issued in 1929, the time that I said that I have a conversation with him about the Dr. Carfagni insurance. [55]

PHILIP B. SULLIVAN

a witness on behalf of defendant, being duly sworn, testified as follows:

I reside in Larkspur, Marin County. In the month of June, 1929 I was the agency superintendent for the National Union. I could not say that in June, 1929 I was familiar with the system of bookkeeping that the company had. I knew the way they were handling it, but I did not have anything to do with the bookkeeping end of it.

(The witness here looks at Folio No. 5503-1, National Union Indemnity Company, Leo Pockwitz Company, Inc.) It would be impossible for me to recognize any number as one of the folio numbers of the National Union Company because there were about fifty of them in the whole office. This was the type and the form that was used at the time that I was there. Concerning the source from which National Union Indemnity Company secured policy No. 622599 from Dr. Fred R. Carfagni, apparently it was under Leo Pockwitz' folio. It is to be assumed that the source of that business in 1929 was Leo Pockwitz Company. (The document was here offered for identification and marked as Defendant's Exhibit G for identification)

WITNESS continuing: (The witness is here shown and looks at certain papers handed to him by counsel) These three papers, the first of which is a yellow paper, National Union Indemnity Company, E. F. Payne, 401 Balfour Building, City, Folio No. 5513-1, and a white ledger sheet or sheet marked "National Union Fire Insurance Co., Folio

(Testimony of Philip B. Sullivan.)

No. 5513-1, E. H. Payne, 401 Balfour Building, City, and another Folio No. 5504, National Union Indemnity Company, E. H. Payne, 401 Balfour Building, City, appear to me to be the bookkeeping records of the National Union Company at the time that I was supervising the agencies. I will state that this folio number [56] here 5513, I remember distinctly is an office folio for the National Union, and a policy in here would be written right in the National Union office. I distinctly remember that Folio No. 5513. In other words, the name there, Fred R. Carfagni, 6-1-30, would be written directly between E. H. Payne and the National Union Indemnity Company. That particular policy No. 619666 did not go through Leo Pockwitz; as far as the daily was concerned, it was written right in the office.

I could not tell you how the policy from June, 1930 to June, 1931 was written, or by whom, because I was out of the National Union in 1930. I left on the first of January, 1930. I could not tell you anything about the second folio here, 6-1-31, because I left there on the first of January, 1930. (The documents were here offered for identification and were marked Defendant's Exhibit H for identification)

WITNESS continuing: Of course I can't remember the policy No. 619666. That would be from 1930 to 1931. I was not there in June, 1930. I left on the first of January, 1930.

(The document marked Defendant's Exhibit G for Identification was here offered and received in evidence and marked as Defendant's Exhibit G in evidence.

Leo Pockwitz Co. Inc.

Memo.	Suspense	Debit	Credit
Brot. Fwd.		7,785.48	
929			
C. B. 134			25.00
C. B. 134			2,772.76
Fwd.		7,785.48	2,797.76

Folio No. 5503-1 — National Union Indemnity Co. — Leo Pockwitz Co. Inc.

Date	Assured		Policy No.	% Comm.	Premium	Paid	Return Premium	Previous Total	Total to Date
	July 1929								
6- 6-29	Natl. Carbon	L	20305	30	30.66	Nov 1 '29 JE			
		PD	-513	30	6.93	Nov 1 '29 JE			
6-11-29	Helen Holt	L	12078	30	19.20	Sep 25 '29			
			12043			SPLD			
5-28-29	F. G. Frasier	L	12069	30	35.64	Sep 25 '29			
		PD		30	24.30	Sep 25 '29			
5-29-29	O. De Vaughn	L	12071	30	39.60	Sep 25 '29			
		PD		30	13.00	Sep 25 '29			
		COL		30	51.00	Sep 25 '29			
6- 5-29	W.P.Lhommedieu	L	12073	30	28.34	Sep 25 '29			
		PD		30	9.35	Sep 25 '29			
		COL		30	34.00	Sep 25 '29			
6- 9-29	W. A. Davidson	L	12074	30	22.68	Sep 25 '29			
		PD		30	8.10	Sep 25 '29			
5-28-29	Western Sulphur Industries	L	12075	30	15.30	Sep 25 '29			
		PD		30	5.25	Sep 25 '29			
5-29-29	T. D. Macmullen	L	15781	30 AP	4.04	Sep 25 '29			
		PD		30 AP	1.31	Sep 25 '29			
5-15-29	S. F. Mtls. Co.	L	606461	30 AP	.69	Sep 25 '29			
		PD		30 AP	.82	Sep 25 '29			
5-15-29	" " "	L	606482	30 AP	68	Sep 25 '29			
		PD		30 AP	.30	Sep 25 '29			
6- 1-29	Mrs. E. Eisenberg	L	606732	30 AP	13.76	Sep 25 '29			
6- 1-29	J. Kelleher	L	621368	30	11.88	Sep 25 '29			
		PD		30	8.10	Sep 25 '29			
6- 8-29	G. Georgiades	L	621369	30	42.56	Sep 25 '29			
		PD		30	10.00	Sep 25 '29			
6- 2-29	J. P. Hermans	L	622596	30	37.80	Sep 25 '29			
		PD		30	9.90	Sep 25 '29			
6- 1-29	F. Garfagni	L	622599	30	55.04	Sep 25 '29			
		PD		30	13.00	Sep 25 '29			
6- 6-29	R. C. Powell	L	622600	30	38.00	Sep 25 '29			
		PD		30	11.70	Sep 25 '29			
6-23-29	J. Clawson	L	622601	30	32.40	Sep 25 '29			
		PD		30	8.10	Sep 25 '29			
6-25-29	C. D. Herbert	L	622602	30	38.15	Sep 25 '29			
		PD		30	11.05	Sep 25 '29			
6-29-29	N. H. Callard	L	622603	30	35.70	Sep 25 '29			
		PD		30	9.35	Sep 25 '29			
6-12-29	H. Mannizzi	L	622605	30	37.80	Sep 25 '29			
		PD		30	9.90	Sep 25 '29			
6-29-29	Leo Pockwitz Co.	L	622609	30	29.93	Sep 25 '29			
		PD		30	6.75	Sep 25 '29			
								822.66	Bal. Fwd.

Date	Memo.	Suspense	Debit	Credit
June	Brot. Fwd.		7,785.48	
	Jul 1929			
(6-27)	C. B. 134			25.00
25	C. B. 134			2,772.76
	Fwd.		7,785.48	2,797.76

Folio No. 5503-1 — National Union Indemnity Co. — Leo Pockwitz Co. Inc.

Date	Assured		Policy No.	% Comm.	Premium	Paid	Return Premium	Previous Total	Total to Date	Date	Memo.	Suspense	Debit	Credit
	July 1929 FWD							822.66		July	Fwd.		7,785.48	2,797.76
6- 5-29	F. Guendet	L	622598	30	28.15	Sep 25 '29								
		PD		30	9.30	Sep 25 '29								
6-26-29	H. Nannizzi	L	622606	30	32.40	Sep 25 '29								
		PD		30	8.10	Sep 25 '29			900.61					
5-29-29	W. Davies	L	11959	30		Sep 25 '29	18.35							
		PD		30		Sep 25 '29	7.50							
6- 3-29	L. Bologna	L	15640	30		Sep 25 '29	6.29							
		PD		30		Sep 25 '29	3.49							
5- 4-29	J. Kelleher	L	15751	30		Sep 25 '29	6.67							
		PD		30		Sep 25 '29	4.56							
6- 4-29	K. Koberstein	L	20305	30		Sep 25 '29	7.45							
		PD	-471	30	-	Sep 25 '29	2.30							
6- 7-29	F. J. West	L	105322	30		Sep 25 '29	7.11							
		PD		30		Sep 25 '29	3.63							
6- 4-29	A. Cohn	L	606558	30		Sep 25 '29	10.32							
		PD		30		Sep 25 '29	2.60							
5-15-29	H. W. Fish	L	606722	30		Sep 25 '29	35.85							
		PD		30		Sep 25 '29	7.86							
5-24-29	O. Canrell	L	621336	30		Sep 25 '29	31.50							
		PD		30		Sep 25 '29	9.90							
5-27-29	M. R. Bloch	L	622583	30		Sep 25 '29	39.56							
		PD		30		Sep 25 '29	9.35							
5-23-29	H. M. Mason	L	622586	30		Sep 25 '29	4.00							
		PD		30		Sep 25 '29	2.00	900.61	680.32					
6- 4-29	Lachman Bros.	L	12060	30 AP	28.13	Sep 25 '29								
5-28-29	"	L		30 AP	30.78	Sep 25 '29								
6-17-29	G. Parini	L	12084	30	17.00	Oct 25 '29								
		PD		30	16.00	Oct 25 '29								
		COL		30	24.00	Oct 25 '29								
7-23-29	A. Fernandez	L	12089	30	12.00	Oct 25 '29								
		PD		30	6.00	Oct 25 '29								
6-20-29	Paul Ryan	L	12093	30	18.00	Oct 25 '29								
		PD		30	13.00	Oct 25 '29								
7-18-29	A. Silver	L	12094	30	27.00	Oct 25 '29								
		PD		30	8.00	Oct 25 '29								
		COL		30	27.00	Oct 25 '29								
6-25-29	W. D. Ryan	L	12096	30	12.00	Oct 25 '29								
		PD		30	6.00	Oct 25 '29								
6- 1-29	M. E. Strauh	L	621372	30 AP	2.22	Sep 25 '29								
		PD		30	.63	Sep 25 '29								
7-14-29	J. D. Gerontopulos	L	622611	30	27.00	Oct 25 '29								
		PD		30	8.10	Oct 25 '29		680.32	963.18 Bal Fwd	July	Fwd.		7,785.48	2,797.76

(Endorsed): Filed U. S. Dist. Court, 2, 10, 33.

(Endorsed): Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of Philip B. Sullivan.)

Cross Examination.

At this time, as I have already testified, Leo Pockwitz Company were general agents of National Union Indemnity Company. With reference to the issuance of policies upon applications over the telephone, the only information, as far as I know, the underwriters on the street asked for was just the assured's name and the make of the car, the motor number and the effective date and the coverage desired. For the twenty-six years that I have been in the business, it has not been the custom for the company or for the general agents of the company to [57] ask for any other or further information than that which I have stated, where applications were taken for policies over the telephone. Practically twelve years of the twenty-six years that I have been in the business, I have been particularly concerned with this line of business and with the taking of applications for automobile policies. I will mention this fact, in some cases if a broker comes into the office, and we have no previous business from him, we will ask him that question occasionally, but where the broker is well known, we never ask that question at all. Mr. Payne was a well known broker in June, 1929. He was well known not only in our office, but on the street, referring to the automobile insurance business. Mr. Payne was on the street as long as I remember. I have known him myself for close onto fourteen years.

After the information taken over the telephone in the manner indicated by me is received by the com-

(Testimony of Philip B. Sullivan.)

pany, the rates are figured out by the assistant underwriter and turned over to the policy underwriter. There is a copy kept for the office and one for the broker, and the policy is sent with a copy of the policy to the broker.

Q. Going back to June, 1929, in that period that you were with the company, the National Union, was it customary for you to ask of well-known brokers questions appearing upon the policies for the purpose of inserting answers in the policies?

A. There was the regular form of application on every underwriter's desk which did not call for those questions.

WITNESS continuing: When I speak of underwriters, I refer to underwriters of automobiles, quoting rates and taking applications. As a general agent, of course Leo Pockwitz Company would have its own underwriters, but they would be under the supervision of the National Union afterward, when the policy [58] was written.

I was occupying the position of superintendent of agencies. My duties in that position were to supervise the automobile department, and while I had supervision over the claims department, I naturally did not exercise that, because I was not a claims man. I also was in charge of the field work, the agents out in the field, and did quite a lot of production work, special agency work, etc.

I recall about June, 1929 talking with Mr. Payne about his placing some insurance with our company, and I recall that after I talked with Mr. Payne

(Testimony of Philip B. Sullivan.)

about placing insurance with our company, that some insurance was then placed by Mr. Payne. I would say that I solicited Mr. Payne's business, and I assumed that I would have got the business. I don't know that Mr. Payne knew Mr. Pockwitz, and I doubt whether he did or not. I recall soliciting Mr. Payne. Mr. Payne's testimony concerning my approaching him and soliciting him for insurance is correct.

I had a young man by the name of Grady under me at the National Union from June, 1929 to January, 1930, when my services terminated. He was in the claims department. When I speak of the claims department, I refer to the department of the National Union which handled claims in connection with automobile accidents,—upon policies issued by the National Union and upon which it would be called upon to pay losses. His name was Walter E. Grady. A form of renewal order upon the back of the policy purporting to have been issued on May 9, 1930, as a renewal policy No. 622599 was not the form of renewal order that the National Union had in use during the time that I was there. I am sure that Mr. Grady was employed by the National Union in its claims department on May 8, 1930. He handled all claims that I know of that came under his jurisdiction. I [59] don't know whether he handled personal injury cases or not; he took reports, of course, but as far as investigations were concerned, I do not think he did. He handled the adjustment of claims. He was strictly in the

(Testimony of Philip B. Sullivan.)

claims department. I think there was also a Mr. Armstrong and a Mr. Anderson in the claims department at that time, and there were a few investigators doing independent work outside. The Mr. Armstrong to whom I refer is the same Mr. Armstrong who is here today, and who is connected with the Insurance Commission. Mr. Armstrong was in charge of the claims department at that time, and Mr. Grady was working under him.

Redirect Examination.

Mr. Harry Old was in charge of the claims department at one time. He was general agent in 1929 and 1930. I think he was general agent when I left the company. I know that Mr. Grady was in the claims department after I left the company. I know that because I was in touch with them. I had to go in and out of there once in a while.

I was agency superintendent of the company. Mr. E. H. Payne, who has been mentioned here, was just a broker. He had no connection with the National Union Company. The statement "No Exceptions" was put in the three policies that were issued to Dr. Carfagni under the declaration No. 9 because it seemed to be a general procedure. It is done right now. "No exceptions" means it is understood that there may have been, or there may not have been. When declaration No. 9 "No company has cancelled or refused to issue any kind of automobile insurance for the assured during the past three years, except as follows" has "No Exceptions" I would not say that that means that no

(Testimony of Philip B. Sullivan.)

company has ever cancelled him out. I would say that it is for lack of further information. The only thing I can say is that it has been the custom of insurance underwriters since I have [60] been in the business, and they are still doing it. I do not say that the custom is in conflict with that provision, in taking the application from the broker over the telephone or otherwise. In other words, we would assume that there is no exception if he had been cancelled out of any other company.—It would mean he had not been cancelled out of any other company.

Recross Examination.

It was our custom, in making out a policy, after we took the information over the telephone or from a broker whom we knew, the information not referring to that particular subject matter at all, to have the policies made out with the words "No Exceptions" in there in answer to these particular matters Nos. 8 and 9 in the policy. That was the custom in the matter of getting up policies and sending out policies of men performing the same work in insurance companies in San Francisco that I was performing at that time—and I say that still the same custom prevails as far as putting in "No Exceptions". The custom was to write in "No Exceptions" in the policy. It was the custom in the business in preparing these policies to put in "No Exceptions" in answer to Declarations 8 and 9 without having first discussed that subject with the broker who placed that policy with us.

(Testimony of Philip B. Sullivan.)

The COURT: He has already testified to that, but that is not going to get very far with me when it comes to pass on the case. I don't care what the custom was. I would be bound by the written provisions of the policy. I have allowed you to go into it.

Mr. BARRY: I assume we can take up the legal questions involved later.

The COURT: Yes, there is already an abundance of testimony in on that. [61]

CHARLES HAUG,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

I reside at 3735 Lincoln Avenue, Oakland. My business is that of insurance underwriter, and I am now connected with the St. Paul Mercury Indemnity Company. On or about June 1, 1929, I was connected with National Union Indemnity Company. I was doing automobile underwriting for a while. I assume that I was doing that at that time. (The witness is shown Plaintiffs' Exhibit No. 2 and examines the same.) I have examined plaintiff's Exhibit No. 2. I have examined some handwriting on the face of that exhibit, and I know whose handwriting that is. It is mine. Looking at that handwriting, and refreshing my recollection from that exhibit, I am able to state that in this particular

(Testimony of Charles Haug.)

case I had a telephone conversation with Miss Hearney of Leo Pockwitz Company. On Plaintiffs' Exhibit No. 2, in my own handwriting is written "Broker says insurance was overlooked, absolutely no claims." The policy was issued June 1, 1929; the automobile was purchased in October, 1928. Now, when the effective date on the policy does not correspond with the date that the car is purchased, we usually inquire from the broker or the source from which the business was placed, the reason why the effective date of the insurance does not correspond with the date the car was purchased, and sometimes we find that the policy was in another company for a few months, and the other company had cancelled the policy. In this particular case I called up Leo Pockwitz Company, through which this was placed, to find out if such was the case. They advised that there had been no claims, and that the insurance was overlooked; that is, evidently there had been another policy that had lapsed, and that the assured did not know that his policy had lapsed or did not find out until June 1, at which time the policy was written through Leo Pockwitz Company. [62]

Cross Examination.

I should say that I was in the employ of the National Union approximately three years. I was in its employ until St. Patrick's Day, about two years ago, 1930. I do not recall exactly whether I was with the company at any time after March, 1930.

(Testimony of Charles Haug.)

There was a young man employed in the company while I was there by the name of Grady. (Witness is shown renewal order on the back of Plaintiffs' Exhibit 3, relating to renewal of policy No. 622599). I do not recall this form of renewal order. I do not think that the National Union had a form like that while I was there. The writing upon the renewal order "Renewal recommended, W. Grady" is Mr. Grady's writing. I believe Mr. Grady was with the company in May, 1930. "Renewal recommended by W. Grady" meant it was recommended by Mr. Grady in the office. I assume that Mr. Grady had handled claims by or against Dr. Carfagni. That was part of the work, the handling of claims, that came into the office.

Redirect Examination.

I believe it was in March, 1930, that I left the National Union. It was the practice and custom, if no further information was given to the company, to renew the policy upon the basis of the first policy.

Recross Examination.

In connection with a recommendation from any one in the office concerning a renewal of a particular policy, they probably would look into it and find out if the recommendation had any merit, and if it did, they would probably renew it. Mr. Grady recommended the renewal of the policy. I would not say that the company did as a whole. This recom-

(Testimony of Charles Haug.)

mendation is written upon the renewal order, and it was intended for the consideration of one who would consider the renewal order and determine whether or not a new policy would be issued. I assume [63] that where a recommendation of that kind was made, the company would look into the matter and then determine whether or not the renewal would be made. Where a policy had already been issued by the company, the memorandum on the renewal order that the renewal was recommended by someone in the office would, I imagine, indicate that there had been some question raised as to whether the insurance would actually be renewed. There must have some question come up at about the time the policy was expiring, about renewing the policy; otherwise, Mr. Grady would not have recommended it. No, I do not think it came up, as the record would appear to me, merely as a matter of course at that time.

Further Redirect Examination.

If, during the year 1929, an assured such as Dr. Carfagni, had a collision or two collisions, and they went through the claims department, it would have been that sort of an investigation that the claims man would make his notation upon the policy. In the case of Dr. Carfagni, this claim record showing here a number of claims would be the one that the claims man would act on at that time.

M. E. JACOBUS,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

I reside at 540 Francisco Drive, Burlingame. I am in the insurance business. The particular branch of insurance in which I am occupied is the claims department. I am now employed by the London, Lancashire Indemnity Company and the National Union Company. My business in both of those companies is superintendent of claims. National Union Indemnity Company has discontinued the writing of casualty business. I am taking care of and supervising its outstanding casualty claims. In the year 1931 and in the month of June, 1931, I was employed by the National Union Indemnity Company and [64] the National Union Fire Insurance Company as superintendent of claims. Our offices were located at 340 Pine Street, San Francisco.

I, as superintendent of claims of the National Union Indemnity Company in that month and year, had occasion to pass upon an accident report of Dr. Fred R. Carfagni of 580 Green Street, San Francisco. The accident was first reported by telephone early in the morning after the accident. The date of that report was June 23, 1931, and the first report was given by telephone by Mr. E. H. Payne, broker, who handled the Dr. Carfagni risk, who reported that a certain accident had occurred, and that one party was killed and also made much of the fact tht Dr. Carfagni's car was badly damaged. I told him I would look into it immediately or words to

(Testimony of M. E. Jacobus.)

that effect. I assigned the investigation to two of the adjusters in my department. The investigation was progressing, and we had some difficulty getting a statement from Dr. Carfagni relative to the accident, because he insisted that we consult his attorney before giving any statement whatever. It was early one morning that I had occasion to talk to Dr. Carfagni relative to his giving us a statement of the accident. I could not state the exact date, but it was possibly four days or so after the accident. Dr. Carfagni came down early. I think it was even prior to 9 o'clock; he had an appointment with the adjusters, and I was present at that meeting. Dr. Carfagni briefly mentioned that the accident had occurred, and that he was going to make his report, and as I recall, they left and went to Dr. Carfagni's office, where the report, no doubt, was given. I was not present at Dr. Carfagni's office. It was a few days after I had a conversation with Mr. Carfagni that I met Mr. J. J. Berg, whom I had known for quite a number of years. We had formerly been in Los Angeles, and this was about the first [65] time I met him since I moved back up here, and he made inquiry as to whether we were busy, and the usual inquiry, and during the course of the conversation, Mr. Berg mentioned that a pretty bad accident had occurred there in his neighborhood. Mr. Berg is superintendent of claims of Pacific Indemnity Company. He mentioned this particular accident. It finally developed it was Dr. Carfagni's accident, and

(Testimony of M. E. Jacobus.)

I made inquiry of what he knew about it, and he said he did not know anything. It was in his neighborhood, and he had come up after the accident occurred. Then he mentioned to me that he had had previous experience with Dr. Carfagni, and his company had cancelled out his policy.

Mr. BARRY: I move to strike that out as immaterial, irrelevant and hearsay and not showing that there was any cancellation of that particular risk.

The COURT: What have you to say to that?

Mr. SUPPLE: This goes to the acquisition of first knowledge of any particular cancellation upon the part of Dr. Carfagni; we do not ask that the evidence be admitted as proof of a cancellation by that company, your Honor; we ask that it go in merely for the purpose of connecting up the acquisition of knowledge.

The COURT: All right; overruled; exception.

(Exception No. 4.)

WITNESS continuing: I would judge that it was five or six days after the accident occurred when I had that conversation with Mr. Berg. It was along about the end of the month of June. The conversation with Mr. Berg led me to believe that it was possible there were other cancellations; I immediately checked our records as to the daily report, and notes as to the statement in the policy, and then proceeded to have other investigations

(Testimony of M. E. Jacobus.)

made; inquiries among other companies and various [66] sources, as to the history of that particular risk.

I pursued an investigation then concerning the cancellation history of Dr. Carfagni in San Francisco among the automobile insurance companies.

Q. And out of that investigation, Mr. Jacobus, what did you find, or what did you learn?

Mr. BARRY: I urge the objection that it is immaterial, irrelevant and incompetent, hearsay and not binding in any way upon the plaintiffs in this action or Dr. Carfagni, if he were a party. I will add that it is not within the issues as made by the complaint.

The COURT: Overruled; exception.

(Exception No. 5.)

A. I found that the American Automobile Insurance Company had cancelled a policy, the Home Accident Insurance Company, the Home Fire Insurance Company, on a combination form policy, and through Mullin & Acton, that they had also cancelled a policy.

Mr. BARRY: Do I understand that this is admitted under the statement of counsel concerning the other so-called cancellations for the purpose of showing the information that the witness had, rather than to show that these were cancellations?

The COURT: What is your answer?

Mr. SUPPLE: Yes.

The COURT: Very well.

(Testimony of M. E. Jacobus.)

WITNESS continuing: After learning of the information which I have just recited, I examined the daily report on the policy, under which Dr. Carfagni made his claim. I examined all of the statements given in the schedule of warranties; in fact, I started out with the heading as to the address, the description of the car and other statements as to cancellation [67] and place where the automobile was to be kept, etc. Immediately after getting all of the information together, I took the entire matter up with our attorneys, Cooley, Crowley & Supple and discussed the matter with Mr. Cooley. I discussed it with Mr. Cooley on the day the registered letter was dispatched on June 30, 1931. The registered letter was dispatched to Dr. Fred R. Carfagni. The registered letter which we sent to Dr. Fred R. Carfagni, 580 Green Street, on June 30, 1931, was returned to us with the notation "refused". I have such a letter, such an envelope, in my possession. The envelope that I now hand you, carrying "Refused 3289" is the envelope that contained the letter of June 30, 1931 and the attachment. (Witness hands envelope to Mr. Supple).

(The envelope was offered and received in evidence and marked Defendant's Exhibit I").

(Testimony of M. E. Jacobus.)

DEFENDANTS' EXHIBIT I (i)

Pacific Department
National Union Companies
340 Pine Street
San Francisco, California

Dr. Fred R. Carfagni,
580 Green St.,
City

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

Refused 3289
Return Receipt Requested—Fee Paid.
Registered
835933
Returned to Sender.
San Francisco, Cal.
Jul 1 1931
Registered—San Francisco. (Station B) Calif. Jun 30 1930
Registered—San Francisco, Calif. (Ferry Annex) Jul 3 1931.
Registered—San Francisco. (Sta. B) Calif., Jun 30, 1931
Registered—San Francisco. (Sta. B) Calif., Jun 30, 1931.
140

[Endorsed]: Filed U. S. Dist. Court, Feb. 17, 1933.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of M. E. Jacobus.)

WITNESS continuing: This letter which you now show me, under date of June 30, 1931, National Union Fire Insurance Company, Indemnity Company, Pittsburgh, Pennsylvania, Pacific Department, 340 Pine Street, San Francisco, Calif., addressed to Dr. Fred R. Carfagni, 580 Green Street, San Francisco, California, re National Union Policy No. 627670 is a letter that I enclosed in the envelope by registered mail, which was returned to the National Union Company. After the return of that registered letter, refused by the addressee, and prior to the opening of the letter at all, I had one of our office boys make two trips out to Dr. Carfagni's office, and he reported that he tried both the office and his residence for the purpose of delivering the letter and the tender of the same personally. When I refer to a tender in the letter, I am referring to the returned premium, the full returned premium on policy No. 627670 in the sum of $176.82. After that report from the messenger boy, I discussed the letter with Mr. Cooley and made [68] mention of the fact that the firm of McKenzie & McKenzie were representing Dr. Carfagni, and he immediately telephoned, or Mr. McKenzie telephoned Mr. Cooley, I don't know just exactly which, but they had a telephone conversation, and Mr. Cooley then handled the matter as far as the delivery of the letter and the delivery of the returned premium was concerned.

(Testimony of M. E. Jacobus.)

Mr. SUPPLE: And, Mr. Barry, Mr. Harry McKenzie handed you, did he not, certain correspondence which he had as attorney for Dr. Fred R. Carfagni in this matter, and one of the letters which he handed you was an original letter under date of June 30, 1931, of National Union Fire Insurance Company, Indemnity Company, Pittsburgh, Pennsylvania?

Mr. BARRY: That is correct, but I am assuming now from what counsel has said that he will show just how this letter got into the possession of Mr. McKenzie, because it does not seem to have reached him through the mail. That is correct, he got that letter from me, and we agree that the foundation for all of this correspondence need not be laid by the presence of Mr. McKenzie.

WITNESS continuing: Mr. Harry McKenzie or McKenzie & McKenzie were referred to me by Dr. Carfagni as his attorneys. I knew that he had mentioned the firm of McKenzie & McKenzie at the first conversation I had with him in the office, and then also I had a telephone conversation with Dr. Carfagni, at which time he asked me to O. K. the repairs at the Larkins Garage, and I informed him, I said the investigation developed that there had been a breach of warranty, and under the circumstances, we would be compelled to deny a certain liability, declaring the policy null and void, and we had so notified him, and making inquiry as to whether he had received the letter, because it was

(Testimony of M. E. Jacobus.)

about the time that the letter was en route and could have reached him or might still have been [69] in the mail.

Immediately after getting information as to certain cancellations in other companies on this particular risk, I phoned Larkin's not to release the car until they heard from me, unless Dr. Carfagni personally paid the repair bill, and after I had all the information relative to the cancellation, we elected to deny liability, and I notified Larkin's that we had done so and to look to Dr. Carfagni for the payment of any repairs that they made to the automobile, that we could not approve them or O. K. them.

(The letter of June 30, 1931, to Dr. Fred Carfagni, 580 Green Street, San Francisco, California re National Union Policy No. 627670 was offered and received in evidence and marked "Defendant's Exhibit J").

(Testimony of M. E. Jacobus.)

DEFENDANTS' EXHIBIT J.

National Union
Fire Insurance Co.
Indemnity Co.
Pittsburgh, Pa.
Pacific Department
340 Pine Street
San Francisco, Calif.
Dr. Fred Carfagni,
580 Green St.,
San Francisco, California.
Dear Sir:

Re: National Union Policy No. 627670

This will advise you that we have just learned of a very material false warranty in your automobile insurance policy, to-wit: the warranty that "no insurance company has cancelled or refused to issue automobile insurance" to you.

We have about completed our investigation and have found that several insurance companies had cancelled such insurance held by you before you placed your insurance with us—mostly for bad accident experience. Had you advised us of any such cancellations we would have declined to issue automobile insurance to you.

Accordingly, we hereby notify you that we elect to treat the policy as void from its inception and recognize no liability whatsoever under it. Inasmuch as the premium has been paid upon it, we

(Testimony of M. E. Jacobus.)

attach hereto our check #54344, payable to you in the amount of $176.82, returning said premium to you.

We shall not accept any responsibility for any claims arising under the policy, including claims arising out of this recent collision at the intersection of Lake Street and Park Presidio Boulevard on or about June 22nd, 1931, which resulted in the death of Mrs. Mary Eddy, and injuries to Mr. Albert Eddy, and to Mrs. Albert Eddy, Jr., and also damages to automobile, nor shall we accept responsibility for the repairs of the damages sustained by your automobile in this collision.

Very truly yours,
National Union Fire Insurance Co.
National Union Indemnity Co.
By M. E. Jacobus,
Supt. of Claims.

MEJ:S

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

WITNESS continuing: In this letter of June 30, 1931, we rendered to Dr. Carfagni the company's check in the sum of $176.82, the full premium recited in the policy. (It was here admitted that there were ample funds in the bank to meet that check). I have in my possession letters either from Mr. Harry McKenzie or Edwin McKenzie concerning

(Testimony of M. E. Jacobus.)

Dr. Fred R. Carfagni, and this policy No. 627670 and our rescission of it. I have a letter from Mr. Harry McKenzie, and then carbon copies of a letter of mine and a carbon copy of Mr. Cooley's letter.

(Letter from Harry McKenzie, as attorney for Dr. Fred R. Carfagni, dated July 9, 1931, was offered and received in evidence and marked Defendant's Exhibit K).

DEFENDANTS' EXHIBIT K.

Harry A. McKenzie
Attorney at Law
783 Mills Building
San Francisco
Telephone Sutter 1669

July 9, 1931.

National Union Fire Ins. Indemnity Co.,
340 Pine Street,
San Francisco, California.

Attention Mr. M. E. Jacobus:

Gentlemen:

In re National Union Policy No. 627,670:

I am enclosing herewith: (a) Copy of Complaint in suit numbered 229147, in the Superior Court of the City and County of San Francisco, State of California, Albert P. Eddy and Marie Eddy v. Fred R. Carfagni; (b) Copy of Complaint in suit numbered 229,113, in the Superior Court of the City and

(Testimony of M. E. Jacobus.)

County of San Francisco, State of California, Albert Z. Eddy et al v. Fred R. Carfagni; both of these complaints being for damages alleged to have been sustained as set forth therein by the respective plaintiffs, due to an accident which occurred while said Fred R. Carfagni was driving an automobile covered by the above mentioned policy.

Pursuant to the terms of that policy, we demand that you defend said cases.

We have been informed that you ordered work done on assured's car and have since then failed, refused and neglected to pay the repair bill.

We are also in receipt of your letter of June 30, 1931, addressed to Dr. Fred Carfagni in which you disclaim any responsibility under the terms of said policy, asserting as a reason therefor an alleged breach of warranty.

The statements in your letter are hereby denied on behalf of Dr. Carfagni and we would like to know at your earliest convenience what you propose to do with respect to the defense of these two lawsuits.

Very truly yours,

HM:M HARRY A. McKENZIE.

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

Received Jul 19 1931. Pacific Dept.

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of M. E. Jacobus.)

WITNESS continuing: That letter was answered by my attorney.

(Letter dated July 11, 1931 from Cooley, Crowley & Supple to Harry A. McKenzie was offered and received in [70] evidence and marked Defendant's Exhibit L.)

DEFENDANTS' EXHIBIT L.

A. E. Cooley — Edward D. Keil
Louis V. Crowley — Leighton M. Bledsoe
Frederic E. Supple

Law Offices of
Cooley, Crowley & Supple
206 Sansome Street
San Francisco

July 11, 1931.

Harry A. McKenzie, Esq.,
783 Mills Building,
San Francisco, California.

In re: Eddy v. Carfagni.

Dear Mr. McKenzie:—

The National Union Fire Insurance Company and National Union Indemnity Company have referred to us your letter of the 9th inst. enclosing copy of summons and complaint in action of Albert Z. Eddy, et al. v. Carfagni, No. 229,113, and copy of summons and complaint in action of Albert P. Eddy, et al. v. Carfagni, No. 229,147, in the Superior Court of this City and County. We are returning the

(Testimony of M. E. Jacobus.)

summonses and complaints above-mentioned herewith, and also enclose a check to the order of Fred R. Carfagni in the sum of $176.82, being the amount of premium paid by Dr. Carfagni upon National Union Policy No. 627670.

These companies addressed a letter to Dr. Carfagni under date of June 30, 1931, advising him of their election to treat the policy as void from its inception, and enclosing the check which we are handing you herewith. This letter was sent by registered mail and Dr. Carfagni declined to receive it from the mail carrier.

The writer explained the reasons for the action of the insurance companies to Mr. Edward McKenzie over the telephone a few days ago, and will now reiterate them. As stated in the letter addressed to Dr. Carfagni, which you now have, the companies learned, after the receipt of advice of the injury to the Eddys, of a very material false warranty in the automobile insurance policy issued to Dr. Carfagni, namely, the warranty that "no insurance company has cancelled or refused to issue automobile insurance" to him. The companies have made an investigation, which is not yet completed, but which, to date, shows the following:

The Home Accident Insurance Company issued an automobile policy to Dr. Carfagni on July 27, 1928, and cancelled it on August 15, 1928, on account of a bad report as to his experience. On October 5, 1928, Mullin & Acton issued an automobile

(Testimony of M. E. Jacobus.)

policy and cancelled it on June 11, 1929, because, in that time, Dr. Carfagni had reported seven different accidents. It is the writer's personal recollection that Dr. Carfagni was at one time an insured of the Security Insurance Company of California, of which the writer is an officer, and that insurance was likewise cancelled by that company. We have not checked this latter matter definitely, but are satisfied that it is correct. You can readily understand that our clients would not have issued a policy to Dr. Carfagni had this experience as an assured been disclosed to them.

Will you please advise Dr. Carfagni that the decision of the National Union Companies is final, in view of what their investigation has thus far disclosed, and that they will not indemnify him in any way under the policy.

Yours very truly,
COOLEY, CROWLEY & SUPPLE
By A. E. Cooley

AEC:EM

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

2605

Is Binding on Carfagni injured.

—cc 2605 — 2607—

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of M. E. Jacobus.)

(Thereupon letter dated July 16, 1931 from Harry A. McKenzie to A. E. Cooley was offered and received in evidence and marked Defendant's Exhibit M.)

DEFENDANTS' EXHIBIT M.

Harry A. McKenzie
Attorney at Law
783 Mills Building
San Francisco
Telephone SUtter 1669

July 16, 1931.

Mr. A. E. Cooley,
Attorney at Law,
206 Sansome Street,
San Francisco, California.

Dear Sir:

I am in receipt of the complaints in the three cases of Eddy vs. Carfagni, as referred to in your letter of July 11, 1931.

I naturally protest your action in refusing to defend under the policy and am returning herewith the check in the amount of $176.82.

Many of the statements contained in your letter are, according to my information, erroneous.

Very truly yours,
HARRY A. McKENZIE.

HM:M
1 Encl.

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of M. E. Jacobus.)

WITNESS continuing: After having denied liability, and after interchange of correspondence, which has just been offered in evidence and read, the National Union Indemnity Company refused and stepped entirely out from representation in any manner whatsoever of Dr. Carfagni.

Cross Examination.

I first went into the employ of the National Union on April 1, 1931. I have been continuously in the employ of the National Union, either solely as already stated by me, or in conjunction with my work with the London & Lancashire ever since that time. Between April, 1931 and July, 1931, I was working exclusively for the National Union. My position at that time was superintendent of claims. Prior to my connection with the company, Mr. Armstrong was superintendent of claims. During the period from April to July, 1931, Mr. Armstrong was an adjuster, an assistant to me. Mr. Grady was not with the company during any part of the time that I have been with it. I had nothing to do with the underwriting department. That is the department in which the policies were written. Mr. Arnberger was at that time superintendent of the casualty department, and Mr. J. M. Zemek was assistant secretary of the Indemnity Company.

As superintendent of the claims department, I was the head of that department. As superintendent of the underwriting department, on the casualty end

(Testimony of M. E. Jacobus.)

of it, Mr. Arnberger was the head of that department. Between the time that I went into the employ of the National Union, April, 1931, and the happening of the [71] Carfagni accident, I did nothing whatever toward looking into Carfagni's record as a driver. During that period of time, I heard of the name of Carfagni in connection with the business of the office, because Dr. Carfagni had a collision loss pending. I do not think that that loss was pending at the time of the Eddy accident. It was pending some time prior to the happening of the Eddy accident and while I was with the company. The repair bill on that loss came before me with the request of Mr. Payne, asking that I call him. He had presented two bills, and as I recall from the record, the bills were paid, during the daytime on June 22, 1931. The Eddy accident occurred at night on that day. I did not, in connection with that claim, do anything toward looking up Dr. Carfagni's record as a driver or his record with other companies. If I recall, it was within a day or so of when I paid the loss, which was on or about June 22, that I first had notice of that particular accident resulting in that particular claim. No claim was presented by a third party to me or to the company, that I know of. I could look at my record on that subject and see whether a claim was presented by a third party at that time. The first one who brought anything to my attention concerning Dr. Carfagni was Mr. Berg, who was also in the insurance busi-

(Testimony of M. E. Jacobus.)

ness at that time. Mr. Berg was connected with Swett & Crawford, who were the agents for the Pacific Indemnity Company. The information that Mr. Berg gave me at that time was a definite statement that his company that he had been with, had cancelled Dr. Carfagni. I did not ask him as to the date when his company had cancelled Dr. Carfagni. He mentioned it was the Security Insurance Company, but without mentioning the time of the cancellation to which I referred.

When I got back to my office that day, I investigated in the office for the purpose of obtaining some information on [72] that subject. I looked back at the daily of 1929 and also the daily of 1930. I looked at the daily concerning the policy issued in June, 1931; all three policies. I did that before I got in touch with any other companies to find out what Dr. Carfagni's record was in other companies. From those dailies I learned that in our own company losses had been reported by or against Dr. Carfagni on the 1929 policy and on the 1930 policy. I do not think I had before me at that time, in connection with the matter, the card to the National Union, which showed Dr. Carfagni's loss record upon the two policies, the one issued in 1929 and the one issued in 1930. I did not have the card at that time, as far as I recall. I did not go into the claims department and talk to the man in the claims department about Carfagni. I did nothing special about questioning the man in the claims department

(Testimony of M. E. Jacobus.)

of the National Union concerning Dr. Carfagni and Carfagni's record, other than making inquiry as to whether anyone knew Dr. Carfagni.

(The witness is here shown Plaintiffs' Exhibit No. 2) Before I started forth upon my investigation concerning Dr. Carfagni, after Mr. Berg had spoken to me, I looked at Plaintiffs' Exhibit No. 2 in the files of the National Union Company. At that time, and before starting my investigation, I also looked at Plaintiffs' Exhibit 3 in evidence, which is a copy of the daily issued, or rather, of the policy dated June 1, 1930. I could not say whether I checked all of the notations, the printed and stamped notations, upon both of these policies before I started out to get some further information concerning Dr. Carfagni; I retained the dailies in my file. I made inquiries from various sources, for the purpose of obtaining information concerning Dr. Carfagni, and also had some of the employees make check-ups. I do not think that the first place to which I went for the purpose of obtaining information at that time was the [73] I. C. C. A. of which the National Union was a member. I went to that office at a later date. I first went up to the office of the Insurance Credit Clearance Association Bureau, of which the National Union was a member, after I had dispatched this letter of June 30 and made personal verification. I made the verification with the companies. I made inquiries immediately after the conversation with Mr. Berg and also had the adjusters, and, as I recall, I also asked Mr. Arn-

(Testimony of M. E. Jacobus.)

berger for information, and he was the one who got the daily report or caused the daily report to be furnished to me.

It is possible the employees of the office communicated with the I. C. C. A. for the purpose of obtaining information concerning Carfagni's record, immediately after I asked for information, but I do not know of that of my own personal knowledge. I went up personally to the office of I. C. C. A. and talked to the young lady there. The young lady to whom I refer is Miss Olsen, and it is my understanding that she was a sort of manager of that office. It was after June 30 that I had my conversation with Miss Olsen up at the office. I had numerous telephone conversations. I was getting information over the telephone, in addition to the investigators and parties in the office. I could not say one way or the other whether I had a telephone conversation with Miss Olsen before I went up to see her. I got some information from Miss Olsen at the I. C. C. A. I received the information from some source emanating from the Association of the Home cancellation and Mullin & Acton's cancellation. The Home cancellation is the one concerning a policy issued on July 27, 1928, which was cancelled in August, 1928. I could not say exactly as to the date that the Mullin & Acton policy, concerning which I obtained information through the I. C. C. A. was issued or cancelled, but it was cancelled prior

(Testimony of M. E. Jacobus.)

to [74] or along about the time the National Union policy went into effect.

At the office of the I. C. C. A. I saw a card, a yellow slip which referred to the cancellation of the policy by the Home Company to Dr. Carfagni, which cancellation took place in August, 1928. At that office I saw another card relating to a so-called Mullin & Acton policy. They were acting as a general agency at that time. I could not state as to the names of all of the companies for which they were general agents, but I do know that they had the American Indemnity Company, the National Indemnity Fire Insurance Company, or rather, the Washington Underwriters for the National Liberty Insurance Company. I could not say whether they were general agents for the Western States Company. I do not know what the company was. It would be rather difficult for me to state the date when I first saw these cards at the I. C. C. A., but I know that at the time I personally saw the cards, I also saw the National Union card at the I. C. C. A. That is the card referring to the cancellation of the National Union. The notice was sent out by us on June 30.

When I looked at the daily of 1929 and the daily of 1930 policies, I saw upon them losses reported under those policies. Prior to the date that Dr. Carfagni the Eddy accident, I did not look at those dailies for anything in connection with Dr. Carfagni's record. I did not say that Dr. Carfagni

(Testimony of M. E. Jacobus.)

sent his car up to Larkin's to be repaired. The car was there. I could not say just exactly what transpired as to the car getting there because—the only conversation that I had with Mr. Payne was where he asked that he be notified, or some inquiry as to where the car was to be taken—it was a Lincoln car, and we had made a request that they get some information as to who was going to repair it, and I think there was some conversation later on with Mr. [75] Payne that Larkin's had the car. I don't know anything about the circumstances under which it went there, the regular routine.

From January, 1931 to April, 1931, I was employed in the same company as Mr. Berg. No, I did not know that the National Union was a member of the I. C. C. A., even before Dr. Carfagni's accident, because my connection with the National Union was not until the first of April, and, of course, at that time I did not know all of the details. The relation of the National Union with the I. C. C. A. was a matter particularly for the underwriting department of the National Union. I went over to the I. C. C. A. for information, that is, I think I made the request to make an inquiry there, after I found out about that particular bureau. I knew that the bureau existed in southern California, but at that time I did not know that there was a bureau up in northern California, and up until April, you might state that my experience was mainly at headquarters in southern California. I went into the Na-

(Testimony of M. E. Jacobus.)

tional Union office on April 1, 1931. The Dr. Carfagni policy seems to have been renewed in May, 1931, when I was in charge of the claims department. Under the last accident there was a little memorandum by Mr. Arnberger, and I think, if I recall, there was on it "See me later." That notation was not on the daily. It was with the loss correspondence. I have the notation here among the papers. (The witness here produces a memorandum and hands it to counsel). I have produced here a notation reading "M. E. J. Will see you later on this—looks like a good case of Sub." meaning an abbreviation for subrogation. According to the facts we had, it appeared as though Dr. Carfagni was not responsible for the accident, and, therefore, we would take steps to attempt to recover the loss that we would be compelled to pay for the repairs to Dr. Carfagni's car, under our collision [76] clause of the policy, from the other car that was involved. It is difficult for me to say when I first received or saw this note which has just been read, but it was prior to the time I paid the loss.

(The memorandum was offered and received in evidence and marked Plaintiffs' Exhibit 5)

(Testimony of M. E. Jacobus.)

PLAINTIFF'S EXHIBIT NO. 5.

M E J

Will see you later on this — Looks like a good case of Sub.

RA

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

WITNESS continuing: That memorandum (Plaintiffs' Exhibit 5) does not refresh my recollection so that I am able to state that before the Carfagni policy was issued in 1931, the matter of whether or not it should be issued was taken up with me. That matter was not taken up with me to my knowledge. It is difficult for me to say how long it was before June 22, 1931 that this notice (Plaintiffs' Exhibit 5) was left with me by Mr. Arnberger, because there is no date on it.

Q. Now you have produced here a daily of 1931 with certain documents attached to it. I am concerned at this time with only a document on the back of it, which reads: "Write it, don't say it." I will ask you if this document, this daily of a policy issued on June 1, 1931, together with the document upon which is printed "Write it, don't say it" on the back of that document—whether that was signed by you after the Eddy accident and before you sent the notice of cancellation?

(Testimony of M. E. Jacobus.)

A. Yes, I had seen the daily with the notation.

Mr. BARRY: I offer in evidence at this time this daily and ask that it be marked Plaintiffs' Exhibit next in order, together with the document attached, upon which is printed "Write it, don't say it." I am not offering at this time the document of cancellation, which is attached, because that follows later on, or any of the documents showing cancellation which are attached.

(The daily of 1931 was thereupon received in evidence [77] and marked Plaintiffs' Exhibit 6)

PLAINTIFF'S EXHIBIT NO. 6.

Folio No. 5513 I. Policy No. 627670

Agency S. F.

Renewing 619666 folio 5513 & Rewriting 627657

Combination Automobile Policy

National Union Fire Insurance Company

and

National Union Indemnity Company

Pittsburgh, Pa.

Declarations

Leave this space blank

Amount	Premium	Make
F	.....	
T	.....	Age
C	.....	

(Testimony of M. E. Jacobus.)

..... N-SH

Tor .....

SI ..... Col.

CV .....

1. Name of Assured Fred R. Carfagni.
2. Address of Assured 580 Green Street, San Francisco, California.
3. Assured is (Individual, Co-partnership, Corporation or Estate) Individual.
4. Assured's occupation or business is—(State in Full) Dentist.

..... Employed by .....

5. This Policy shall be in effect for a period of Twelve months from 12 o'clock noon, standard time at assured's address June 1, 1931 to 12 o'clock noon, standard time at assured's address June 1, 1932.
6. The following is the description of the Automobile and the facts with respect to purchase of same.

Model Year 1929. Model No. or Letter ..... Trade Name Lincoln. Type of Body (If Truck, state Tonnage) Sedan. Serial No. ..... Motor No. 51834. Horse power ..... No. of cylinders 8. List price $..... Purchased by the Assured, Month, October, Year, 1928. New or Second Hand, New. Actual Cost to Assured (Including Equipment) $5055.00. Is Automobile Fully Paid For? (Yes or no) Yes. Amount Unpaid $..... No. Unpaid Notes?..... Notes Payable Monthly (If not, state method of payment).

(Testimony of M. E. Jacobus.)

Subject to all the stipulations, provisions and conditions contained in this policy, loss, if any, is payable to (Give name of Person, Firm or Corporation holding any Encumbrance) Assured as interest may appear.

7. The above described automobile is and will be during the period of this policy, used for the following purposes Business & Pleasure.
8. The above described automobile is and will be during the period of this policy, principally used and garaged in the city named in Declaration 2, except as follows: No exceptions.
9. No company has cancelled or refused to issue any kind of automobile insurance for the Assured during the past three years, except as follows: No exceptions.

The Company shall be liable only under that Section or those Sections of the policy for which a specific premium charge is made below.

Amount of Insurance, (Insert either a Specific amount or words "actual cash value") $2000.00.

Part 1—National Union Fire Insurance Company.

Sections 1 and 2. Fire and Transportation, Rate .20; Premium $4.00.

Section 3. Theft—Theft Clause B Applicable, Rate .25, Premium $5.00.

Additional Premium, Broad Form Coverage.....

Section 4. Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, Accidental, and External Discharge or Leakage of Water. Nil. Nil.

Section 5. Collision or Upset in excess of $ Full

(Testimony of M. E. Jacobus.)

Cov. (insert "Full Coverage," "$50.00," or "$100.00" deductible according to coverage desired), subject to Collision peril clause on page two. $87.00.

Credit allowed for Bumpers. (Give name, indicating "Front," "Rear," or "Front and Rear," or insert word "None"), subject to Bumper Clause on page two.

Part One, Total Premium $96.00.

Part 2—National Union Indemnity Company.

Section 6. Liability for bodily injuries or death, (a) Limit one person ($15,000.00) (b) Limit one accident ($30,000.00) $69.12.

Liability for Damage to property of others (c) Limit one accident ($5,000.00) $11.70.

Part Two, Total Premium ..... $ 80.82

Total Premium Part One and Two..... $176.82

Countersigned at.....

This .....day of 5/13/31

E. H. PAYNE

Write It — Don't Say It!

.....19.....

To.....

F	2000	20	4.00
T		25	9.00
Full Cov.			87.00
15/30			69.12
5000			11.70
			180.82

From E. H. Payne

(Testimony of M. E. Jacobus.)
Folio No. ..... Pol. No.....
Cancelled
.....19.....
Flat. Pro Rata. Short Rate.
Ret. Prem. $.....
Register .....
Accounts .....
Map .....
Re-Ins. .....
Expirations .....
Bordereaux .....

[Envelope]

Policy No. 627670 Folio 5513
Renewal No.....
Cancellation
Amount $..... Original Prem. $176.82
Commencement 6-1-31-32
Date Cancelled 6-1-1931
Paid Letter
Flat. Pro Rata. Short Rate.
Ret. Prem. $176.82
Register Oct. 5, 1931
Accounts Oct. 8, 1931
Map .....
Oct. 14, 1931
Re-Ins. Oct. 14, 1931
Expirations .....
Bordereaux Oct. 9, 1931.
National Union Fire Insurance Co.
Pittsburgh, Pa.
per RCA Jr.

(Testimony of M. E. Jacobus.)

[Inside of Envelope]

Copy Copy

June 30th, 1931.

Dr. Fred Carfagni,
580 Green St.,
San Francisco, Calif.

Dear Sir:

Re: National Union Policy No. 627670.

This will advise you that we have just learned of a very material false warranty in your automobile insurance policy, to-wit: the warranty that "no insurance company has cancelled or refused to issue automobile insurance" to you.

We have about completed our investigation and have found that several insurance companies had cancelled such insurance held by you before you placed your insurance with us—mostly for bad accident experience. Had you advised us of any such cancellations we would have declined to issue automobile insurance to you.

Accordingly, we hereby notify you that we elect to treat the policy as void from its inception and recognize no liability whatsoever under it. Inasmuch as the premium has been paid upon it, we attach hereto our check #54344, payable to you in the amount of $176.82, returning said premium to you.

We shall not accept any responsibility for any claims arising under the policy, including claims arising out of this recent collision at the intersection of Lake Street Park Presidio Boulevard on or about June 22nd, 1931, which resulted in the death of Mrs.

(Testimony of M. E. Jacobus.)

Mary Eddy, and injuries to Mr. Albert Eddy and to Mrs. Albert Eddy, Jr. and also damages to automobile, nor shall we accept responsibility for the repairs of the damages sustained by your automobile in this collision.

Very truly yours,
NATIONAL UNION INSURANCE CO.
NATIONAL UNION INDEMNITY CO.
By: M. E. Jacobus,
MEJ:S Supt. of Claims.

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.

Amer. Re Ins. Company
Re-Ins. Cancl'd
Re-Ins. Cancl'd
P46379 1512.
R. I.
Examined Jun 8, 1931. G. M. R.
Flat
Re-Ins. Declared
Cancelled
Correct May 15, 1931, Examiner.
Registered May 14, 1931
Accounts Jun 2, 1931
Mapped.....
Reins. May 27, 1931
Expirations May .....
Fire Record.....
Com'l Rating.....

(Testimony of M. E. Jacobus.)

Bordereaux Jun 3, 1931.

Board.....

54.00

CAN

Flat

Account, Year, Month. State 5. City 2. Folio 5513. Policy Number 627670. Kind 4. Form 1. Make of Car 023. Age 3. Liability 2000.00. Total Premium 96.00.

Fire Code 1. Fire Premium 4. Theft Code 5. Theft Premium 5. Coll. Code 10. Collision Premium 87. Commission 2B. 10

Flat

Policy Number 627670. Kind Bus. 1/3. Pl. or Misc. Limit 6. Effective, Year 31; Month 6. Term Mos. 12. Expiration, year 32; Month 6. .....5513. Commission 2B 2B.

Trans. 1. State 04. City 43. Cov. 1/2. Class 132. Exposure 12. .....69.12. ..... 11.70. P. D. Limit 1.

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

Redirect Examination.

The pending loss claim to which counsel has referred, that was paid after I came to the National Union Indemnity Company, was a loss claim of Dr. Fred R. Carfagni. I paid that claim on June 22. That is the date of the draft. I attempted to recover the loss under subrogation. In that case, in

(Testimony of M. E. Jacobus.)

my opinion, Dr. Carfagni was in the right. I figured from the facts that Carfagni was not responsible, and the cleaning and dyeing truck which struck him was.

I said that I went over to the I. C. C. A. Bureau after June 30 and saw some cards there and talked with Miss Olsen, who was in charge. I had no knowledge at that time or any other time that Dr. Fred Carfagni had a policy in the Travelers Insurance Company, which commenced on August 13, 1928 and was terminated September 5, 1928.

Recross Examination.

I have a copy of the draft for the payment made to Dr. Carfagni on that accident which preceded the Eddy accident. That draft does not refreshen my recollection to the extent of bringing that accident back, as far as the happening of it was concerned to December 12, 1930. I did not know that, because it was pending when I took charge of the office, and, as I said before, Mr. Payne, the broker phoned and said he had presented the bill. The document that I have in my hand here, the draft, refers to the accident as having taken place on December 12, 1930.

J. L. CULPEPPER,

recalled for plaintiffs, further testified as follows:

I assume that this I. C. C. A. (referring to the letters I. C. C. A. on the daily of the Home Accident Insurance Company, which is part of Defend-

(Testimony of J. L. Culpepper.)

ant's Exhibit B) means that when the [78] policy was cancelled, the I. C. C. A. was notified. Frankly, I don't know that our office did note this on the cancelled policy. It is on the daily. It was the practice of the office to notify the I. C. C. A., but I do not recall whether it was the practice of the office to note it on the cancelled policy. [79]

RICHARD ARNBERGER,

a witness on behalf of defendant, being duly sworn, testified as follows:

I reside at 1441 Laguna Avenue, Burlingame. I am special agent for the Wallace Phipp General Agency. It is an insurance agency. I have been in the insurance business approximately ten years. During part of that ten-year period I was employed by the National Union Fire Insurance Company and National Union Indemnity Company. I was first employed by them in the early part of September, 1927 until the 30th day of November, 1931. When I first went to work for them in 1927, I was employed as an underwriter. I was under the direct employ of Mr. Phil Sullivan, who was then the manager of the automobile department, and my duty consisted of the acceptance or rejection of risks, the reviewal of the risks written by outside agencies and taking care, in general, of any under-

(Testimony of Richard Arnberger.)

writing matters that came into the office. (The witness is here shown plaintiffs' Exhibit No. 2) From an examination of plaintiffs' Exhibit No. 2 I can state that I participated in the underwriting of that insurance. I reviewed that first daily after it had gone through the various departments of the office. You will note my examination stamp in the upper left-hand corner reading: "Examined July 9, 1929, R. C. A. Jr." May I go right on and explain the system of the office? When daily reports are received, such as this, they were immediately turned into the register department, where a record was kept of the policies that had been issued to avoid the duplication of policy numbers. Then the new business was turned over to the underwriting department, where at that time we were breaking in two new underwriters. One of the underwriters, you will note by a stamp on the daily, "C. H." refers to Charles Haug. This examination stamp of Mr. Haug's refers to the fact that he examined the risk for the amount of insurance allowed on [80] the car, and the rate, and seeing that every warranty was answered. The daily report was then coded by a young lady and turned in to the accounts department, where it was recorded for information to the home office. After it was released from the accounts department, it was brought back to a file on my desk, and the dailies were held there until I had time to review them, to make certain that all of the

(Testimony of Richard Arnberger.)

warranties had been approved, and the daily report had gone through every department of the office, at which time I placed my examination stamp on the daily report, and then it was sent to the general file. In other words, mine is the final approval of the risk. The approval is dated July 9, 1929. At the time that I gave my final approval to this risk, that is, as specified in Plaintiffs' Exhibit No. 2, I did not have any knowledge of any kind whatsoever concerning any prior cancellations of Fred R. Carfagni, 580 Green Street.

Cross Examination.

When I say that I had no knowledge at that time, I am referring to myself personally having no knowledge. In the underwriting department there were other men besides myself. I am not prepared to say whether or not there was information in the files in the underwriting department of our office concerning Dr. Carfagni. At that time the National Union was a member of the Bureau known as the I. C. C. A. I knew the function of that Bureau, and that the Bureau was one of which certain insurance companies were members. I knew that those certain insurance companies that were members, under the regulations of the Bureau and the business of the Bureau, were supposed to report losses to the Bureau.

I knew Miss Olsen, who was connected with the

(Testimony of Richard Arnberger.)

Bureau at that time. She was manager of the Bureau. Miss Olsen received the various confidential reports from the member companies of the Bureau, and through a stencil type machine [81] made her record and ran off these stencils and segregated them, and I believe every day she made a round of the various members of the Bureau during the day. At the National Union these cards came in from day to day. In 1929, the cards, when they were delivered to the National Union by Miss Olsen, were merely filed in an individual cabinet. We had a cabinet in which these particular cards were filed. All of the cards that came in were filed in the same cabinet, which was kept under the counter of the underwriting department, in which new policies and renewals of policies were taken and written. I reported at times the cancellation of policies to the Bureau. When I made those reports from the National Union to the Bureau, the turning in of reports was followed by the delivery of a notice to the National Union itself in those particular cases. During the period of 1929, those notices that came in in that way were filed in the same filing cabinet as the other notices. In 1929 when the first policy came in, the policy which was dated June 5, 1929, notices received from the I. C. C. A. were filed in this cabinet, and the cabinet was in or under the counter of the underwriting department. There came up for renewal the matter of a policy issued

(Testimony of Richard Arnberger.)

to Dr. Carfagni in 1929. The policy being issued in 1929, it came up for renewal in 1930. When it came up for renewal in 1930, I do not recall personally whether or not I accepted the order for renewal, but at the time we were breaking in another young man in the underwriting department, a Mr. More, and his duties consisted of renewal of policies, and the renewal order, regardless of whom it was taken by, was turned over to Mr. More, so that he could get out the daily report, and assuming that everything was in order, he would write the line for renewal.

When I refer to the daily report, I refer to an exact copy of the policy. In connection with the renewal of a policy [82] to one who had a policy already with the company, it was customary to look at the notation of claims in the claims department. That was a rule I had put in in the early part of 1930, when I had become superintendent of the automobile department. I became superintendent after Mr. Sullivan left the office entirely. I put a rule into effect on a renewal of any line that had a loss stamp on the daily report, the daily report in all losses filed were to be investigated by the underwriters. When I speak of the underwriter, I am referring to the particular man in the underwriting department handling that particular matter. That practice was followed in the office. Every daily report that had a loss report during the life of the policy had that stamped notation that a loss had

(Testimony of Richard Arnberger.)

been reported under the risk. The underwriter would secure the claims report numbers, or rather the claims folder number from an index card in the automobile department, filed alphabetically, and then secure the claims folder from one of the members of the claims department. In many cases the claims folder showed that the claim was closed without payment. It was merely a case in which an assured had reported an accident, and there was no liability existed. If such was the case, there was no necessity of the underwriter having further discussion, because the risk was considered a good one, without any further discussion with anyone in the claims department. In other cases, in which, from the card itself or from the records of the claims department, it was considered that the matter was worthy of a further investigation, the claims were discussed with the adjuster who handled the particular claim, if possible, to get his exact version of the risk.

(The witness is here shown Plaintiffs' Exhibit 3, and his attention is directed by counsel to a document on the back of that, entitled "Renewal order" referring to policy 622599, Folio 5503). That is a form of renewal order [83] which was used in the office of the National Union in May and June of 1930. The notation upon the renewal order (part of Plaintiffs' Exhibit 3) reading "Renewal recommended by W. Grady, 5-8-30" was written by the gentleman that I have just mentioned a while ago, Mr. More, who was in our employ for about three

(Testimony of Richard Arnberger.)

or four months. W. Grady was an adjuster in the claims department at that time. That notation indicated that Mr. Grady, or rather that Mr. More, took up the matter of the renewal of the Carfagni policy, the one of 1929, with Mr. Grady in the claims department, and to the underwriting department it was a recommendation from the claims department that the policy, a new policy, be issued to Dr. Carfagni.

(The witness is here shown Plaintiffs' Exhibit 2 and his attention is directed to certain circles in lead pencil drawn around the date that the policy was issued and the date that it would expire). Those marks upon Plaintiffs' Exhibit 2 were made by me personally. As I previously stated, I was just breaking in Mr. Haug as an underwriter, and one of the features of the underwriting of the risk was to make certain, or rather, to investigate in cases where the inception date of the policy was different than the purchase date of the car. In this particular case, the policy went into effect on June 1, 1929, and the car was bought in October, 1928, and naturally there was a question as to where the insurance was between that period. Those remarks made by me upon the October date and upon the date that the policy was issued were so made to direct Mr. Haug's attention to the fact that I wanted an investigation. Whether I asked Mr. Haug personally, or just allowed it to remain in the file, that is, in the basket in his desk, I could not say, but his attention was

(Testimony of Richard Arnberger.)

directed to that instruction by the notation which is shown on the daily report here; in other words, he conducted the investigation that I desired. The circles could [84] have been placed around those dates on the daily report when the risk was first presented to the office. It was recorded in the office June 14, 1929; it probably would be the 13th or 14th of June, 1929.

I cannot give you any definite time that Mr. Haug made the notation upon this policy "Broker says insurance was overlooked". It might have been when Mr. Haug was reviewing this risk, and after this, after June 15. If my instructions were placed in the daily report in the files, he would have made his investigation right there, from June 14 to June 17. That policy (referring to Plaintiffs' Exhibit 2) was already issued and outstanding. As far as what Mr. Haug did afterward toward checking up on the matter, I knew nothing more about it, except as the policy might show it. I have referred to notations upon the policies, one of the notations "Loss reported under this policy". That notation was not made in the underwriting department. It was placed on the daily report by a young lady in the claims department. The daily reports were kept in a general file. The young lady would pull the daily report out, so that she could make a claims folder. In other words, a claims folder had to be coded identical to the daily record. The notation "Loss reported under this policy" was placed upon the daily to

(Testimony of Richard Arnberger.)

draw my attention to the fact that there had been a loss reported under the policy. It was placed there, too, so that if the policy came up for renewal, the fact that there had been losses under the policy would be known to the particular underwriter handling the matter.

(The witness' attention is here directed to the daily, referring to the policy issued for the term beginning June 1, 1931) That particular daily did not come to my attention at the office at or about the time that it was [85] placed in our files—This daily never came across my desk. According to the handwriting, Mr. Roloson handled the renewal at that time. He was an underwriter in the department; he was my assistant after I became superintendent. The slip of paper on the back of this policy (referring to the Carfagni policy for the term beginning June 1, 1931) on which slip is written "Write it, don't say it" was merely a scratch pad sent out for advertising purposes by the Insurance Forms Association. This scratch pad was used in the National Union at that time. There were many of us who had these pads. When a telephone message came in to have a certain policy renewed, information was taken for the purpose of knowing what particular policy was referred to. (The witness' attention was directed to some writing on the memorandum or slip attached to the Carfagni policy for the term beginning June 1, 1931). That is Mr. Roloson's writing. I cannot make out the first word

(Testimony of Richard Arnberger.)

that is there. Below that is written "re-write" and then follows the notation fire and theft $2,000, the rate and premium, full collision, 15-30 public liability, $5,000 property damage, or a total premium of $180.82, Broker, E. S. Payne. That indicates that the one who took the order for the renewal of the policy at that time took that information in connection with the renewal, and then the matter of whether or not the policy would be renewed was taken up in the underwriting department.

On that policy, the one that was issued in June, 1931, the practice was followed of going to the claims department and taking up the matter of whether or not the policy should be renewed with the claims department. The universal practice to which I have referred already, relative to the renewal of policies under which there had been losses, was followed at that time. In the underwriting department we did not take up in every particular case the [86] matter of or determine whether or not policies would be written. In some cases we did. I would write the application for the policy so that all information would be right before the policy writer, the young lady. She was in my department, but in another part of the office. In the matter of renewing a policy, we merely quoted a policy number, without this information, except we showed the amount of fire and theft to be allowed for the new year, and quoting the rate and premium and quoting the premium for any other coverage that was

(Testimony of Richard Arnberger.)

desired. This particular slip of paper (referring to the slip attached to the policy of Dr. Carfagni issued in June, 1931) was attached to the daily report that was to be renewed, and the policy writer merely got her information from the old daily report. That was the procedure followed relative to the renewal of the two Carfagni policies. I was with that company until November 30, 1931.

Redirect Examination.

I have been asked about the daily reports and the notations on them of losses upon the part of the insured. That refers to his experience with our company, so that in the case of Dr. Carfagni, if four losses were reported, and they were minor losses, and in my opinion he was not in fault, I would renew the policy at the time of renewal. In other words, this so-called loss experience and investigation made concerning it refers to the loss experience of our own company. That is all.

I did not handle the renewals of this policy of Dr. Carfagni in 1930 or 1931. They were handled by underwriters in the office. Our invariable practice in the underwriting department was that, in the absence of any further information, we would renew the policy in our department upon the information contained in the original policy—we renewed them on the information we had in our own files; that is, the information in the original policy or the daily report [87] and the claim files. (The witness' attention is here directed to Plaintiff's Exhibit No. 2)

(Testimony of Richard Arnberger.)

The blue pencil notation on Plaintiffs' Exhibit No. 2 is in Mr. Charles Haug's handwriting. I was a subordinate in the underwriting department of Mr. Phil Sullivan from September, 1927, when I first went with the company until June 1, 1930.

I knew of the Association of I. C. C. A., and that the National Union was a member of that association, and that certain cards were delivered over there from time to time by Miss Olsen. Those cards that were delivered there, say in 1929, were put in a cabinet in the underwriting department and left there. In 1930 when I took charge of the department, I changed the practice of that office. As soon as it was possible, that is, as soon as I had time to get around to it, I made arrangements whereby these I. C. C. A. cards were to be interwoven with the index cards which were carried on every policy written in our office. At the time the policy was written, the policy writer automatically made up an index card and expiration notice; one was filed alphabetically, and the other was filed by month of expiration, and it was my intention to have these I. C. C. A. cards interwoven with the index cards, so that at any time we saw an I. C. C. A. card carrying the same name as one of our own index card, we would know an investigation was necessary. (Witness' counsel here hands a paper to the witness) This little blank paper which you have handed me was the form of expiration card used at that time. (The paper was here offered and received in evidence and marked as Defendant's Exhibit N)

(Testimony of Richard Arnberger.)

DEFENDANTS' EXHIBIT N.

B-319

National Union Fire Ins. Co.
National Union Indemnity Co.
340 Pine Street, San Francisco, California

Assured..... Policy No.....
Folio No. .....
Address..... Expires.....

Fire &			Make Year Factory or
Theft	.....	P. D.	..... Motor No.
Confiscation	.....	Coll.	.....
Embezzlement	.....	Limited	.....
Public Liability	.....	$100 Ded.	.....

Dear Sir—

We wish to advise that this policy expires on the above date. We would appreciate your early order to renew.

Very truly,
National Union Fire Ins. Co.

Agent.....
Broker.....

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of Richard Arnberger.)

When I came in full charge in 1930, mine was the final say on the acceptance or rejection of risks. That was also true in 1931. Referring to Defendant's Exhibit N, I changed the practice of the office so that, to illustrate, [88] the name of the assured, assuming it to be Dr. Fred R. Carfagni, would be put on Defendant's Exhibit N, and that would be put in a monthly file. The I. C. C. A. cards would not be put in this particular file, that is, the expiration notice, which was filed monthly. There was a duplicate slip attached to this particular memorandum. He made an exact copy, giving the assured's name, address and coverage. I called that an index file. (Counsel here shows the witness an index card) That is the index card where the I. C. C. A. cards were filed—interwoven, as we put it. (The index card referred to by the witness was offered and received in evidence and marked Defendant's Exhibit O)

(Testimony of Richard Arnberger.)

DEFENDANTS' EXHIBIT O.

Index Card

Assured..... Policy No.....
Address..... Expires.....

Fire &			Make Year Factory or
Theft	.....	P. D.	..... Motor No.
Confisca-			
tion	.....	Coll.	.....
Embezzle-			
ment	.....	Limited	.....
Public		$100	
Liability	.....	Ded.	.....

Agent.....
Broker.....

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

WITNESS continuing: All of the blanks were filled in. This practice was followed in 1930 and 1931 under my supervision. The invariable practice that we had in our office on that particular matter was as soon as the young lady discovered an index card and an I. C. C. A. card bearing the same name, regardless of the address, she withdrew both cards from the file, secured the daily report and turned them over to me personally for attention. I was supervising the underwriting.

(Testimony of Richard Arnberger.)

The COURT: Q. When would you do that, when the matter of renewal came up?

A. No, the I. C. C. A. card might be lying in our file for six months, and then if we secured an application, and we wrote up the policy, at the same time the policy was written, index cards and expiration notices were typed, and she secured them the next day and immediately proceeded to file them.

Q. Still I do not understand.

Mr. SUPPLE: Could I go into that, your Honor?

The COURT: Yes. [89]

WITNESS continuing: If, for instance, in June of 1930 we got an I. C. C. A. card on Dr. Fred R. Carfagni, that would be filed in this particular cabinet. Then, if in July we got a new piece of business from him, we would write up that policy, and as part of the writing up of the policy, there would be an index card. Then, when the young lady filed that in this particular index file, she would come upon the I. C. C. A. card, and then that card, together with this index slip and the daily report would be handed to me. Then I would immediately go over the I. C. C. A. card and make my decision as to whether we would accept the risk which we had just written.

The COURT: Wouldn't you do that, too, on an application for a renewal?

A. Possibly we should have done that, but business was coming in fast at that time.

(Testimony of Richard Arnberger.)

Q. I say that would be your practice?

A. The practice was to check them up immediately after the policy was written.

WITNESS continuing: When we renewed a policy, we had the same index card for the renewed policy like we did for every other policy. Therefore, on that renewed policy, we would have an index card which would go into that same cabinet.

Q. Now, I will ask you, Mr. Arnberger, whether at any time in 1930 or 1931, under your invariable practice, you had placed upon your desk any index cards of Dr. Fred R. Carfagni with any I. C. C. A. cards?

Mr. BARRY: The question is objected to on the ground that it is immaterial. It is not a question of what was placed on his desk. It is a question of whether there was information at the National Union.

The COURT: Yes; nevertheless, I will overrule the objection. Exception. [90]

(Exception No. 6)

A. I have no recollection of ever having received the index card and I. C. C. A. card on Dr. Fred R. Carfagni.

The COURT: When were these cancellation dates?

Mr. SUPPLE: If your Honor please, they were prior to 1930.

Mr. BARRY: August, 1928 and June 11, 1929. The second one was not a cancellation, but that is the date that is referred to.

(Testimony of Richard Arnberger.)

Mr. SUPPLE: I think there is a summary here which shows Home Accident 2/27/28, and under the word "Replacement" 8/13/28; Travelers 8/13/28, 9/5/28.

The COURT: They were prior to 1930?

Mr. SUPPLE: Yes.

Recross Examination.

I said that the policies were renewed on a certain basis, that is, where they came up for renewal; the procedure to which I have referred of checking up with the claims department was followed and was part of the basis to which I referred. As far as a policy in our company for a year or two years was concerned, we were very particular in investigating the record of the man with the company during that period of time. That was the practice followed at the time of each renewal. In a case where the policy was with us for a period of two years, as the Carfagni policy was, we had no other information when the matter of renewal came up than his record with our own company. When I speak of renewal on the basis of the original policy, I refer particularly to the matters that do not change from year to year; for instance, the kind of machine, the amount of the coverage, the name of the owner, the business of the owner, the type of the machine and other information of that kind. Where an assured was with our company for a period of two years, [91] all that we could refer to in the matter of the renewal of the policy, having only our own company informa-

(Testimony of Richard Arnberger.)

tion on hand, was whether or not he had a passable record with our own company. When I say having our own company information on hand, I am taking into consideration, too, the fact that the I. C. C. A. was an association of which our company was a member.

Mr. BARRY: Now, Counsel, have you a notice that was sent by the I. C. C. A. to the National Union on or about August 13, 1928, of the cancellation of the Home policy dated July 27, 1928?

Mr. SUPPLE: Mr. Barry, I have in our possession cards.

Mr. BARRY: That is what I want.

Mr. SUPPLE: Yes—the source of them—

Mr. BARRY: We can go into the source of them later, but I want to get the cards.

Q. I show you a card—

Mr. SUPPLE: I might state, if you are going to offer these in evidence—

Mr. BARRY: I am not offering those yet.

Mr. SUPPLE: But the card, I understand from an investigation, is a code system of some kind, and that this handwriting is not part of the card.

Mr. BARRY: That is correct. Did these cards come from the files of the National Union?

Mr. SUPPLE: I will not say that, I don't know. I will have to ascertain that. I will call Mr. Jacobus on that later.

Mr. BARRY: Can't you get it so that I can proceed and finish with Mr. Arnberger?

(Testimony of Richard Arnberger.)

Mr. SUPPLE: I will ask Mr. Jacobus.

(Mr. Arnberger was here temporarily excused, so that Mr. Jacobus could further testify.) [92]

M. E. JACOBUS

being recalled as a witness testified as follows:

Mr. SUPPLE: Mr. Jacobus, where did you get these cards, and when did you get them?

A. The cards were given along with other information I requested from the investigators and the employees in the office.

Mr. BARRY: Q. In the office at the time that you started to make and were making investigation concerning Dr. Carfagni?

A. They were brought to me.

Q. They were brought to you in the office of the National Union by employees of the National Union. Isn't that correct?

A. That is correct.

RICHARD ARNBERGER

recalled for further cross-examination, testified as follows:

Mr. BARRY: I show you a card on which is written, "Assured, Dr. Fred R. Carfagni, 580 Green Street, Address S. F., coverage auto 14575, Date of policy 7/27/28, Date of Cancellation 8/15/28, Agent or broker E. H. P., Code No. C., Remarks, 8/13/28

(Testimony of Richard Arnberger.)

Member 6." That was the form of card, was it not, that was sent out by the I. C. C. A. to its members concerning the cancellation of policies of which it was notified?

A. Yes.

(The card referred to was offered and received in evidence and marked Plaintiffs' Exhibit 7).

PLAINTIFF'S EXHIBIT NO. 7.

Assured	Dr. Fred R. Carfagni
	580 Green St.
Address	S.F.
Coverage	Auto - 14575
Date of Pol.	7-27-28
Date Canc.	8-15-28
E.P.	
Agt. or Broker	E.H.P.
Code No.	C
Remarks	8-13-28
Member	6

I.C.C.A.

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

1930

Bad report

Home Accident

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of Richard Arnberger.)

WITNESS continuing: Relative to the coverage, it says on Plaintiffs' Exhibit 7 "auto" and a certain number. That is the number of the policy that was cancelled by the member company [93] on the bottom. The "E. H. P." under "Agent" or "Broker" refers to the particular broker who handled that policy. The code number "C" or letter "C" indicates, according to a system of code, what the reason for the cancellation was. I don't know off-hand what C meant at that time. "Remarks", after that is written "8/13/28"; that is the date on which the information was sent out by the I. C. C. A. "Member 6" indicates the particular member in the association who made the report to the association.

Redirect Examination.

When I referred to the placement of certain I. C. C. A. cards in the index file to assist me in my underwriting, I referred to the kind of a card as illustrated by Plaintiffs' Exhibit No. 7. That is the form of card that was put in the index card system.

Mr. E. H. Payne gave us a very small amount of business as a direct broker of the National Union. I have not checked up the number of policies placed by him with National Union, but it is a very small amount of business. I know from the fact of knowing the broker's name.

Recross Examination.

Personally I did not know Mr. Payne; I knew who he was, but I never met the man. I knew he

(Testimony of Richard Arnberger.)

was a broker, but I could not say what volume of business he had. It was early in 1930 that I changed our system there in the office under which the cards were attached to the documents to which I have already referred. I am referring now to the I. C. C. A. cards. I would say it started right in the middle of January. It is hard to say whether it was in effect prior to May 5, 1930, the date upon which the policy was renewed, because there were thousands and thousands of these cards that had to be interwoven with the index file, and at the time that I made this change, the [94] index file had never been properly taken care of, in that when a policy expired, the index card was allowed to remain for two or three years, and that necessitated the young lady going over and pulling out all of the dead index cards and then commencing to interweave these I. C. C. A. cards; and if I recall correctly, she was on it some time. The system under which the cards were attached in the manner indicated by me was in effect prior to May of 1930, but I could not say whether all of the files had been completed; that is to say, she was required to go back into the files of these cards and attach them or segregate them. As I have stated, she had to go over the index file and eliminate all dead index cards on policies that had expired two or three years in the general practice, before I took it over. We took over these cards that we had accumulated there, and we applied them or had them applied to our system.

(Testimony of Richard Arnberger.)

The National Union was a member of the I. C. C. A. for the purpose of obtaining the confidential information from other companies concerning risks.

(The defendant here rested).

NEAL WEAVER

a witness on behalf of plaintiffs in rebuttal, being duly sworn, testified as follows:

I am connected with Swett & Crawford. I am assistant manager in charge of casualty and automobile work. I have been with the firm, which has had two or three corporate names, for about two months over nine years. I was with that firm during the years 1929 and 1930. I have in my possession some records of an association that existed up to a short time ago, known as the Insurance Credit Clearance Bureau. I have brought with me from those records, which are in my possession, a card relating to the cancellation of the policy issued by the Home Accident Insurance Company to Dr. Fred R. Carfagni. (The witness here [95] hands counsel card relating to a policy issued in July, 1928 and cancelled in August, 1928).

The I. C. C. A. organization started in February, 1928, and we had seventeen members at the time it started. For various reasons, different members of the group resigned, some of the companies merged with others, and others discontinued business, until we finally got to the point where we only had six

(Testimony of Neal Weaver.)

members left, and the information that was coming from the six members to be transmitted back and forth between them was not of sufficient value to warrant the continuation of the group of the organization, and we voluntarily discontinued it and sold the furniture, the typewriter, etc., and then it came to what to do with the records. These records, I offered, on account of the fact that our company had considerable space in its supply room, to take over and let them be stored there until some use might come of them in the future, with the idea that at a later date, the organization might be revived again. I don't know the exact date that the organization actually disbanded in the way indicated by me. It was seven or eight months ago, less than a year ago.

During the time that the I. C. C. A. was in business, it had a place of business in the Adam Grant Building. The period of time over which the I. C. C. A. office was in the Adam Grant Building was from February, 1928 until it was discontinued. A Miss Olsen was the name of the party in charge of the office. She was in charge of the office during the years 1928 and 1929, with the exception of the first three or four months, when we had another young lady in charge, she was in charge. At the beginning of the time when we started the organization, we had a young lady there who was not exactly competent, and we availed ourselves of Miss Olsen's services about four months after we started and let

(Testimony of Neal Weaver.)

the other young [96] go. We started in February, 1928.

This organization had as its members various companies engaged in the insurance business. They were all engaged in the automobile business. Some of them also had various other lines of insurance. At that time, during 1928 and 1929, the National Union Indemnity Company was a member of the organization, and at that time the Home Accident Insurance Company of Arkansas was a member. I did not know of a company by the name of Western States, I believe the Western States, I am not cognizant of the full name, I think it was the Western States General Agency which has a function similar to that of Swett & Crawford. They are wholesalers of insurance, representing insurance companies. If I might refresh my memory here by looking at this record, I might be able to recall what companies they represented. (Witness here looks at document). I do not see on our list of original members any reference to Western State or Western States. I just recall that at that time, in the Adam Grant Building, on the first floor, I believe it was operated by Mullin & Acton. I cannot recall the exact name. There might have been an insurance company known as Washington Underwriters, a member of the association, but not as I recall. These memberships were by officers.

The National Union Indemnity Company, which is part of the National Union Fire Group, was a member, but there was no National Liberty Group a member at that time, that I recall. In 1929 mem-

(Testimony of Neal Weaver.)

ber No. 10 was Pacific Employers Insurance Company. Member No. 6 at that time was the Home Accident Insurance Company. I have here the code which was in use among the members of the Association, that is, the I. C. C. A. which indicated to the members what certain letters meant upon the reports. The letter "C" referred, on the code, to bad credit report. Where a policy was cancelled, and the code letter "C" was the reason [97] stated for the cancellation, the reason for the cancellation, according to the code was bad credit risk.

(The record produced by the witness was here offered and received in evidence and marked Plaintiffs' Exhibit 8)

PLAINTIFF'S EXHIBIT NO. 8.

Assured	Dr. Fred R. Carfagni
	580 Green St.
Address	S.F.
Coverage	Auto - 14575
Date of Pol.	7-27-28
Date Canc.	8-15-28
E.P.	
Agt. or Broker	E.H.P.
Code No.	C
Remarks	8-13-28
Member	6

I.C.C.A.

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of Neal Weaver.)

Cross Examination.

The Travelers Insurance Company was not a member of this I. C. C. A. bureau. I have no record that the Washington Underwriters was a member of the bureau. The Western States was never a member of the bureau. The organization operated on the basis of sending information to its members only when some definite action had been taken with respect to a policy or reports having to do with the actual cancellation, possibly not of the entire policy, but of a portion of it, or some definite direct act on the part of the company. I could not say that if Dr. Carfagni had had a fire insurance policy with the Home Fire Insurance Company, and it had been cancelled out, that it would have reported that cancellation to the bureau. This bureau operated merely for the transmittal of information on automobile insurance. For a part of the time during its operation there was cancellation information sent in on combination insurance, and there might have been some on fire. It could have been that when a report was sent in to the Bureau, of cancellation, that it was for insurance other than automobile insurance. It is not correct to say that the only thing that the card would show would be that that particular insurance had been cancelled in that company. In addition to that, the card showed the class of coverage, the policy number, the date of the policy and the date of the cancellation. When we got that information on the card showing the cancellation by a particular com-

(Testimony of Neal Weaver.)

pany, the card showed by code the reason for cancellation. The information coming to the Bureau came by code. If we cancelled [98] a policy for the nonpayment of premium, it would show Code A. The other one, the code that Mr. Barry was speaking about, was Code C, bad credit reports. The card that we had in the Bureau showed nothing but the code. If a member of the Association who received the card wanted any detailed information, he then called upon the member company making the report and asked why the report was made, and what were the details. A reference to the card which would show, say, a bad credit report would not show anything of the contents of the report. It was five years ago that this lady, whom I classed as incompetent was with the Bureau, and to the best of my knowledge, she was there about three months. Probably I should not have used "incompetent". Unsatisfactory is a better word. I, of course, at that time had nothing to do with the actual mechanics of the operation of the Bureau, and I do not recall just exactly why this young lady was discharged. The president of the organization at that time was Mr. Wheeland, and he secured the services of Miss Olsen, telling the members of the Executive Committee, and we concurred in whatever recommendation he made, that he believed that Miss Olsen was better fitted for the work than the young lady we had working before.

(Testimony of Neal Weaver.)

Redirect Examination.

The Bureau was a non-profit organization. The members paid an initiation fee and monthly dues. The number of the policy upon the card is Auto 14575, and that is the policy of the Home Accident Insurance Company of Arkansas, according to the code report.

Mr. BARRY: I might state to your Honor, for your Honor's information, that the record shows that that was the number of the Home policy that was cancelled.

WITNESS continuing: Mr. Wheeland was president, but he was not in the office with Miss Olsen. Miss Olsen and the [99] young lady preceding her operated the office by themselves. They had no assistance whatever. Mr. Wheeland was in the insurance business as a general agent at that time, and he conceived the idea and organized the group and was elected its first president. The function of the president and the executive committee was to generally supervise the work, sign checks and see that the scheme was carried out as started.

Recross Examination.

I have not in my records here, the records that I have of the Bureau, any notice of cancellation of Travelers insurance policy 5855454 or any record of Washington Underwriters policy No. 26503. I have a policy here which, according to the code was Pacific Employers Insurance Company, and which bears that number which you just called No. 26543.

(Testimony of Neal Weaver.)

That is not the Washington Underwriters, according to our code here. It is the Pacific Employers Insurance Company. I have a record of a policy 26543, but according to the code, it is Pacific Employers.

To Mr. BARRY: I have a reference to only one policy No. 26543. I believe at that time Mullin & Acton were the general agents of the Pacific Employers. I have referred to this second card as full coverage, 26543. That is the coverage association value, which would indicate in insurance terms full coverage policy, covering all phases of automobile insurance. It shows the date upon which the policy was issued. That date was October 5, 1928.

Mr. BARRY: It conforms both as to date and as to number 26543 with this one before you here. Now, I will offer this in evidence, may it please your Honor, and ask that it be marked as Plaintiffs' Exhibit next in order.

(The document was received in evidence and marked Plaintiffs' Exhibit 9) [100]

(Testimony of Neal Weaver.)

PLAINTIFF'S EXHIBIT NO. 9.

Assured	Dr. Fred R. Carfagni
	580 Green St.
Address	S.F.
Coverage	Full - 26543
Date of Pol.	10-5-28
Date Canc.	6-11-29
E.P.	
Agt. or Broker	E.H.P.
Code No.	B
Member	10
Remarks	9-2-29

I.C.C.A.

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

WITNESS continuing: This card (referring to plaintiffs' Exhibit 9) refers to E. H. Payne as broker. It refers to "B" as the cause for the cancellation of the policy. "B", according to the code, stands for bad experience. No. 10, the number of the member, according to the list that I have here, was the Pacific Employers and not by name the Washington Underwriters. This record, which is

(Testimony of Neal Weaver.)

now in evidence, as Plaintiffs' Exhibit 9, contains the number 26543, full coverage, and the date of issuance of the policy is October 5, 1928. It also shows the date of the cancellation of the policy. That date was June 11, 1929.

SIGNA OLSEN

a witness on behalf of plaintiffs in rebuttal, being duly sworn, testified as follows:

I reside at 34 Mallorca Way. During the years 1929 and 1930 I was employed by the Insurance Credit Clearing Association. The office of the association was in the Adam Grant Building. I continued in the employ of the association until September, 1932. I entered its employ in August, 1928. (The witness' attention is here directed to Plaintiffs' Exhibit 8 and also Plaintiffs' Exhibit 9, and she examines the same). I recognize those records (referring to Plaintiffs' Exhibit 8 and Plaintiffs' Exhibit 9) as records that were in the file of our association during 1928 and 1929, at the particular dates specified on those documents. The association at that time received reports from its members, and where it received reports from its members concerning policy relations with certain risks in insurance, policy holders, the information was brought in to me on report form in code.

The report form in code was practically the same as the documents which you have shown me, and which are marked Plaintiffs' Exhibits 8 and 9. Upon receipt of those reports [101] from the mem-

(Testimony of Signa Olsen.)

ber companies, it was our practice to type the report in hexograph ink on an indelible printing form and placed on a duplicating roll and rolled off and distributed to the companies, the member companies of the I. C. C. A. In August, 1928, the National Union was one of the members, and I believe that the Home Fire Accident of Arkansas was another member. The copies that we made were the same in form as the copy which we received from the member company. This form (Plaintiffs' Exhibit 8) is one form, copies of which were sent out by me to the member companies in 1928. There is something upon this copy in evidence here, Plaintiffs' Exhibit 8, which suggests to me the date upon which I delivered the information; that is, the copies, to the members of the association. In the remarks column is the date I delivered it. The date that I delivered exact copies of Plaintiffs' Exhibit 8 to member companies was August 13, 1928. At that time I delivered a copy of Plaintiffs' Exhibit 8 to the National Union Indemnity Company. I think so; that was the daily routine, and I did that. The same procedure was followed by me relative to making a copy of a report made in accordance with Plaintiffs' Exhibit 9 and the delivery of the copies to members of the association. The copies were delivered to all of the members on the date in the remarks column. The date in the remarks column is September 2, 1929, and that is the date upon which the deliveries were made by me to each of the member companies. The deliveries were

(Testimony of Signa Olsen.)

made by me personally by going from office to office.

Mr. BARRY: Now, Counsel, I would like to have, if you have it in your possession, the second card, a copy of the notice with respect to the policy issued on October 5, 1928.

Mr. SUPPLE: You had it here this morning.

Mr. BARRY: I know I had it at that time.

Q. This card that I show you now from the records of [102] the National Union Indemnity Company is a card that you delivered to that company on September 2, 1929. Is that correct?

A. September 2, 1929.

WITNESS continuing: I delivered it without any of the pencil marks upon the card and without the 1930 stamp that is upon the card. I was not familiar with the code and had no occasion to personally use the code.

Mr. BARRY: I offer this document in evidence and ask that it be marked Plaintiffs' Exhibit next in order. I am offering, just as I did with the other documents furnished by the other side only the part of it that is an exact copy of what the witness sent around to the various members at that time. (The card was received in evidence and marked "Plaintiffs' Exhibit 10")

(Testimony of Signa Olsen.)

PLAINTIFF'S EXHIBIT NO. 10.

Assured	Fred Carfagni
	580 Green St.
Address	S.F.
Coverage	Full - 26543
Date of Pol.	10-5-28
Date Canc.	6-11-29
E.P.	
Agt. or Broker	E.H.P.
Code No.	B
Member	10
Remarks	9-2-29
	I.C.C.A.

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

1930

Bad experience

Mullin-Acton

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

Mr. BARRY: It will be admitted, will it not, Mr. Supple, that the card that has just been offered in evidence was in the records of the National Union Indemnity Company, and was delivered up to

(Testimony of Signa Olsen.)

Mr. Jacobus by someone in that company, just as the other one was?

Mr. SUPPLE: That is correct.

Cross Examination.

I cannot take the first card that has been referred to as Plaintiffs' Exhibit No. 9 and tell by that as to whom I delivered that card in the National Union. Referring to Exhibit 8, I cannot tell you to whom I delivered that card, but it was my practice to deliver it to the automobile department. It was left on the counter of the automobile department. Those were not the only two occasions that I delivered cards to the National Union Company. I made delivery practically daily as long as they were members. Naturally when I left the cards on the counter, I left the premises, but there was always someone about. They realized that I was there. [103]

JOHN P. BREEDEN

a witness on behalf of plaintiffs in rebuttal, being duly sworn, testified as follows:

I am now connected with the National Union Company. I have been connected with that company since October 16, 1931. Prior to that time I was with the Home Accident of New York group. I was at one time connected with National Liberty. It was a group up to the time that the Home of New York purchased, then they became a member of the Home

(Testimony of John P. Breeden.)

of New York group. The Washington Underwriters was what we called the Underwriters Agency of the National Liberty. I cannot be absolutely sure of the title "Western States"; my recollection is it was Western States General Agency. It was a general agency that acted on behalf of the Washington Underwriters. The Western States were general agents for the Washington Underwriters. I acted for those companies. Mullin & Acton were agents for those companies. I have no idea about the Pacific Employers. I know nothing about the Pacific Employers Company. I may have heard of it, but I don't recall it distinctly. It was not a fire insurance company. I can say that. I was with the fire insurance end of the business.

Redirect Examination.

The National Union was not a member of the Automobile Credit Service Association.

E. H. PAYNE

recalled as a witness for plaintiffs in rebuttal, testified as follows:

The policy of Dr. Carfagni dated October 5, 1928, was placed by me with Mullin & Acton. The number of that policy was A26543. There was no other policy, that I can recall, that I had issued on behalf of Dr. Carfagni on October 5 or at any [104] other time during the month of October, 1928. I was in

(Testimony of E. H. Payne.)

court at the time that Miss Hearney testified, and after she testified concerning the policy having been originally written by Leo Pockwitz Company, as general agents for the National Union, I checked up on my cancelled checks to see to whom the payment was made by me at that time. I found out that the premium on that particular policy was paid to Leo Pockwitz Company. I recall that at that time, before the issuance of that policy, I was approached by Mr. Sullivan, and had a conversation with him concerning that policy. I did not at the time that that policy was issued or at any other time have any conversation with Miss Hearney or anyone else connected with Leo Pockwitz Company to the effect that the insurance had been overlooked upon the Carfagni automobile, or that there had not been any losses upon the Carfagni automobile, or on the Carfagni policy. I did not have any conversation with anyone, in which I stated to them that Dr. Carfagni had never had insurance cancelled on him. I did not state to Miss Hearney or to anyone else, in connection with any of these policies, or in any other way, that Carfagni had overlooked insurance upon that automobile, or that insurance upon the automobile had been overlooked. I did not, at the time that these policies were placed or at any other time, have any conversation with anyone connected with any of the companies, in which conversation I stated that Dr. Carfagni had not had any insurance cancelled or refused to him. I was not, in connection with any

(Testimony of E. H. Payne.)

of these policies, asked by anyone for any information upon that subject, and I did not in connection with any of these policies, give anyone information upon that subject. I believe it is a fact that Dr. Carfagni acquired the particular car involved in these particular policies issued by National Union, on October 5, 1928. The policies issued prior to that date were in [105] connection with and relating to other cars that had been owned by Dr. Carfagni.

Cross Examination.

I never, that I recall, received any inquiry concerning the discrepancy between the date of the insurance, June 1, 1929 and the purchase of the automobile in October, 1928. There was no one else in my office who would take such message without my knowing it. The discrepancy was never called to my attention, that I recall. I have not the cancelled check on Leo Pockwitz Company, to which I referred. It is in my office, and I could probably get it within an hour. I cannot recall how many policies I placed with the National Union. My records would show that.

Redirect Examination.

I did not give any information or make any such statement as Miss Hearney testified to on that subject.

WALTER E. GRADY

a witness on behalf of plaintiffs in rebuttal, being duly sworn, testified as follows:

I reside at No. 9 Redwood Road, San Anselmo. Up to December, 1930, and for five years previously, I had been with the National Union Insurance Company. For a short period, I was unemployed, and then with the Union Automobile Insurance Company. During the period that I was with the National Union, I was employed in the claims department. The line of work in which I was engaged was the adjustment of losses. (The witness is here shown Plaintiffs' Exhibit 3) During the time referred to in that policy (Plaintiffs' Exhibit 3) and particularly around June 1, 1930, I knew of an assured with the National Union Indemnity Company by the name of Fred R. Carfagni. With reference to renewals of policies that the National Union had outstanding at that time, the practice, relative to the underwriting department [106] taking the matter up with the claims department was as follows: In the matter of the renewal of a policy which the company had carried for a year, or a portion of a year, the claims record was investigated by the underwriting department, and in cases where losses of any consequence had occurred during the previous year, they asked for the recommendation of the claims department before renewing it. Under certain circumstances, the matter of a renewal, whether or not it would be recommended by the claims department, was taken up by the underwriting department. As I explained

(Testimony of Walter E. Grady.)

before, if losses had occurred in an automobile policy, that is all I had anything to do with, during the year, the underwriting department, before renewing the policy, would check over the losses. Now, if the losses paid amounted to any considerable amount, or if they were numerous, we would be requested to pass upon the question as to whether the policy was to be renewed or not. I understand in cases where there were minor losses, there was a general understanding between our department and the underwriting department that they did not have to bother looking up; if there were some trivial loss, the claims record card would show how much was paid out on that claim, and they would not have to bother, but if the losses were numerous or two or three, or the amount paid out was consequential, we would be specifically asked to review those claims. (Witness' attention is directed to Plaintiffs' Exhibit 3) There is nothing that recalls specifically to my mind that this particular case (referring to Plaintiffs' Exhibit 3) has been called to my attention, except a notation on the back. Of course, I don't remember this particular case having been called to my attention, requesting information as to whether it should be renewed or not. As far as I was concerned, it was a matter of routine. I did not charge my mind with individual cases. I would not [107] recall the number of cases that I discussed with the underwriting department. It might have been four or five daily, or it might be some days none

(Testimony of Walter E. Grady.)

at all, and unless there was something particular about the claims record that I could recall now that it would bring back some of these things to my mind, but there is nothing in connection with this one that brings back anything to my mind concerning it—except that I know that under the practice, I and other members of the claims department were called upon for recommendations at times concerning renewal of policies. This notice upon the back of the policy "Renewal recommended by W. E. Grady, 5/8/30" would indicate that that practice was followed in this instance. My services with the National Union terminated in December, 1930.

When I was called upon for a recommendation or refusal of a renewal, a number of times I could say right off-hand that we would not recommend renewal of certain assured who were not considered good risks, or who had serious accidents or a number of accidents. In a number of cases, the claims filed were pulled out of the file case and brought to my desk or to one of the other men's desk, and we would usually remember the claims, if we had handled it, and we would be requested to go over it, if it was consequential in amount, and determine or tell them whether we considered that the assured was at fault, or whether there was a possibility of our recovering in subrogation, and in general to pass upon the merits of each one of these claims, if they were of any consequence; if they were minor accidents, such

(Testimony of Walter E. Grady.)

as parking accidents, etc., we would say Go ahead and renew it, if it did not involve a serious accident.

Cross Examination.

If it did not involve a serious accident, we would recommend it. We would pass judgment on it. If there was a serious accident, and we felt that the assured was at fault, [108] we would not recommend it. So, when we recommended a renewal we would put on, like I put on Plaintiffs' Exhibit 3 here, "Recommend renewal". In other words, we would go into the losses of our office, and under our supervision ascertain and determine whether the assured was at fault, and we would determine whether it was a satisfactory risk to renew. As I say, when I recommended that renewal in Plaintiffs' Exhibit 3, right off-hand I do not recall specifically whether I based that report on a little loss of $11.85, which I approved, or remember having recommended the renewal of that policy. That is my handwriting on the second page of that (referring to exhibit later received in evidence as Defendant's Exhibit P), this loss of $11.85 on March 21, 1930. It is the O. K. of the payment of a bill for $11.85 submitted by the assured in connection with a loss that he had suffered and O. K.-ing the drawing of a draft to the assured to reimburse him for the amount that he had expended. I do not recall this particular loss. I used to O. K. 50 of those a day. I recall these as my records. You asked me first if I am familiar with this form. I am not. This is not the National Union

(Testimony of Walter E. Grady.)

form of accident report. This is a foreign blank. Quite often we might get a report to our company on some other company's form. The rest of the question was for me to determine from this whether I would have considered the assured at fault. No, we would have considered that the assured in this case would be in no way at fault for the accident.

(The document last referred to by the witness was offered and received in evidence and marked Defendant's Exhibit P.)

DEFENDANTS' EXHIBIT P.

National Union Fire Insurance Company
National Union Indemnity Company
Pittsburgh, Pa.
Pacific Department
340 Pine Street
San Francisco, Calif.

Date March 21st, 1930.

L. Pockwitz, 433 Calif. St.
Gentlemen:

We are enclosing herewith draft in settlement of the following claim:

Assured Fred R. Carfagni; claim No. 28286; policy No. 622589; date of accident 1-18-30; kind of loss Coll.; your invoice number.....; amount of draft $11.85.

Very truly yours,
NATIONAL UNION COMPANIES
By.....

(Testimony of Walter E. Grady.)

Edward Lowe Motors Co.
Lincoln Distributor
Sales Parts Service
Van Ness Avenue, at Jackson

Sacramento
1501 I Street
Capital 1680

Stockton
230 No. Sutter Street
Stockton 7180

Private Exchange Connecting All Departments
Walnut 2000

San Francisco, Cal., Feb. 27, 1930
ordered 2 18 30

To Dr. F. Carfagni, 580 Green Street, San Francisco, Calif.,

Motor No. 51834; Mileage 29949; Your order No.....; License No. .....; Job No. 9183A. Net Cash; Description Linc Sedan. Detail. Total.

Quantity			
Labor:			
	Remove, repair & install trunk rack	$7.00	
Material:			
	Acetylene, welding material	.35	
	Enamel trunk rack	4.50	$11.85

(Testimony of Walter E. Grady.)

Edward Lowe Motors Co.
Lincoln Distributor
Sales Parts Service
Van Ness Avenue, at Jackson

Sacramento
1501 I Street
Capital 1680

Stockton
230 No. Sutter Street
Stockton 7180

Private Exchange Connecting All Departments
Walnut 2000

San Francisco, Cal., Feb. 27, 1930
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To Dr. F. Carfagni, 580 Green Street, San Francisco, Calif.,

Motor No. 51834; Mileage 29949; Your order No.....; License No. .....; Job No. 9183A. Net Cash; Description Linc Sedan. Detail. Total.

Quantity			
Labor:			
	Remove, repair & install trunk rack	$7.00	
Material:			
	Acetylene, welding material	.35	
	Enamel trunk rack	4.50	$11.85

(Testimony of Walter E. Grady.)

E. H. Payne
Insurance Service
Adam Grant Building
114 Sansome St., Tel. DOuglas 1410
San Francisco

March 6, 1930.

Leo Pockwitz Co.,
433 California St.,
San Francisco, Calif.

Gentlemen:

Enclosed find bill for repairs to Lincoln car of Dr. F. R. Carfagni, under policy No. 622599. The report has been sent in to the office.

Very truly yours,
E. H. PAYNE

Automobile Loss Report
Mail to
Public Fire Insurance Company
31 Clinton Street, Newark, N. J.

Policy Information—Agency. Date 1/18/30. Policy No. A.622599. Amount. Expiration. Assured Fred R. Carfagni. Address 580 Green Street.

Description of Car—Year Model 1929. Trade Name Lincoln. Type Body Lincoln. Serial No. Motor No. 51834.

Date, Time and Place of Accident—Date of Loss Jan. 18, 1930. Time 9:25 A.M. Estimate of Damage. Accident or Loss occurred at (Here enter Number and Street, etc.) Valencia between 18th and 19th Sts., City San Francisco, State Calif.

Where can car be seen?

(Testimony of Walter E. Grady.)

Fire—Cause. Description of Damage (Use space under Remarks (over) if necessary.

Theft—Was car stolen? Any identification marks? Give full particulars. (Use space under Remarks (over) if necessary. Was equipment stolen? Give description of same (Use space under Remarks (over) if necessary.) Reported to police at. Notice also given to.

Collision—Description of accident. Description of damage sustained rear end of my car (Use space under Remarks (over) if necessary.)

Names and Addresses of witnesses and other information, including details for identification purposes to be entered on back hereof.

Property Damage—Description of property damaged. Name of owner. Give full particulars under "Remarks" over.

Has Fieldman been notified?

.....Agent.

(See Over)

All theft losses must be reported to local police authorities immediately.

Instructions

Report all losses promptly to the office of the Company at 31 Clinton Street, Newark, New Jersey, and to State Agent having supervision.

Do not commit the Company to any line of action unless specifically instructed to do so.

On important losses needing prompt attention, wire the Company.

(Testimony of Walter E. Grady.)

Names and Addresses of Witnesses and Other Information

Mr. Kumle, Yosemite Taxicab Co., 515 Powell St.

B. Bimbarm, Yosemite Taxicab Co., 515 Powell St.

Mr. Coombes, of the Packard Co.

Remarks: I was driving on the Valencia Street car tracks, half of my car being on the tracks and half off. An automobile pulled out from the curb and entered traffic directly in front of me which caused me to stop suddenly. The street car motorman applied his brakes and tried to stop but he could not stop suddenly enough, and struck the rear end of my car.

Valencia Car #276.

Motorman #1722.

[Printer's Note: The following phrases and words are rubber stamped or written across the face of this form.]

28286

OK WEG. Pay Assured. Send to Agent.

Received Mar 10 1930. Pacific Dept.

Received Mar 10 1930. Pacific Dept.

Received Mar 10 1930. Pacific Dept.

Rec'd Jan 20 1930. Leo Pockwitz Co., Inc.

Received Jan 22 1930 Pacific Dept.

Diagram showing position of street car and automobiles.

[Endorsed]: Filed U. S. Dist. Court, 2/17/33.

[Endorsed]: Filed U. S. Circuit Court of Appeals, Feb. 8, 1934.

(Testimony of Walter E. Grady.)

Redirect Examination.

At the time that the policy would come up for successive renewals, the situation in the loss department, up to the time that [109] last renewal was being applied for or being considered, was considered by us. I was not with the company in June, 1931.

(Plaintiffs rested, and the evidence was closed.)

Thereupon plaintiffs and defendant each requested the court to make such special Findings, which requests were by the court then and there granted.

Thereupon, immediately following the close of the evidence, plaintiffs moved the court for judgment in their favor, upon the ground that the evidence was and is insufficient to justify or support a judgment in favor of the defendant or any judgment other than one in favor of plaintiffs. Said motion of plaintiffs was thereupon denied by the court, to which ruling, plaintiffs then and there noted an exception.

(Exception No. 7.)

Thereupon and also immediately following the close of the evidence, defendant moved the court for judgment in its favor, upon the ground that the evidence was and is insufficient to justify or support a judgment in favor of plaintiffs or any judgment other than one in favor of defendant. Said motion of defendant was thereupon denied by the court, to which ruling said defendant then and there noted an exception.

The cause was thereupon continued for argument until February 23, 1933, at which time it was argued and submitted to the court for its decision. Thereafter and on the 1st day of March, 1933, said court, in the absence of both parties, made and filed the following Memorandum and Order for Judgment in favor of defendant, viz.,

[Title of Court and Cause.]

The evidence in this case shows that the defendant insurance corporation had knowledge of the cancellations of the policies issued to Dr. Carfagni by the Home Accident Insurance Company and the American Indemnity Company at the time it issued the policy in [110] suit on May 13, 1931 within the period of three years after the issuance of the policy. If this case were being tried in the California State Court I should be bound to hold that issuance of the policy with the knowledge of the prior cancellations constituted a waiver of declaration No. 9 in the policy, and that plaintiffs should recover. Since, however, this is a case in the Federal Court, I am bound by the law, as declared by the United States Supreme Court that such warranty can only be waived by a writing executed by the proper officers of the insurance company. There is no such writing introduced in evidence in this case, plaintiffs are not entitled to recover. Let judgment be entered for the defendant with costs. It is ordered that findings of fact and conclusions of law be presented by the attorney for the defendant embodying the views herein expressed. In accordance with a request from the Circuit

Court of Appeals of this Ninth Circuit, it is ordered that the findings of fact be in narrative form.

Dated this 1st day of March, 1933.

FRANK H. KERRIGAN,
U. S. District Judge.

(Exception No. 8)

Thereupon, defendant duly prepared its proposed draft of the findings and delivered the same to the clerk of the Court for the Judge and serving a copy thereof upon plaintiffs; and thereafter plaintiffs duly delivered to the clerk and served upon defendant their written objections to the findings as prepared and requested by defendant and their proposed amendments and additions to the findings, which amendments and additions were as follows:

"Concerning said statement numbered 9 in said Schedule of Declarations, the court finds that the Home Accident and Home [111] Fire Insurance Company of Little Rock, Arkansas on July 27, 1928, issued a policy of automobile insurance to said Fred R. Carfagni which said policy of insurance was cancelled by it on August 14, 1928, because of a bad credit report which it had then and there received and obtained concerning said Fred R. Carfagni; and the court further finds that Washington Underwriters Company (of which Western States Insurance Company was general agent) issued an automobile insurance policy to said Fred R. Carfagni on October 5, 1928, the date upon which he became the owner of said Lincoln sedan automobile, and that said policy remained

in effect until June 1, 1929, on which date the first policy of automobile public liability insurance issued by said defendant to said Fred R. Carfagni went into effect, as hereinafter stated. Prior to said 1st day of June, 1929, said Washington Underwriters Company requested the insurance broker for said Fred R. Carfagni to place the insurance of said Fred R. Carfagni in another company, and because of said request, said policy of June 1, 1929 was obtained from and issued by defendant, and thereafter and on June 11, 1929, said Washington Underwriters Company cancelled its said policy of October 5, 1928 upon its books, without giving any notice of cancellation to said Fred R. Carfagni or to any one on his behalf."

"The court further finds that it is not true that Fred R. Carfagni or any one acting for him, in procuring or accepting the policy of insurance issued to him on May 13, 1931, represented or warranted to defendant that no company had cancelled or refused any kind of automobile insurance theretofore issued to him. In this behalf the court finds that said policy of insurance issued by said defendant to said Fred R. Carfagni on May 13, 1931 was so issued without any written application having been made or signed by Fred R. Carfagni or any one on his behalf, and said policy of insurance with said statement numbered 9 in said Schedule of Declarations filled in, as aforesaid, was issued and [112] delivered to said Fred R. Carfagni without said statement having been made or

answered by him or any one for him and without the question of whether or not any company had theretofore cancelled or refused to issue automobile insurance to him being at all mentioned or discussed, and without either said Fred R. Carfagni or any one acting for him knowing, until after June 22, 1931, that said policy contained or purported to contain any statement or answer upon that subject."

"The court further finds that said automobile insurance policy issued and delivered by defendant to Fred R. Carfagni on or about May 13, 1931 was for the policy period from June 1, 1931 to June 1, 1932, and was a renewal of a policy issued and delivered to him by said defendant on or about June 1, 1930 for the policy period from June 1, 1930 to June 1, 1931; and the court further finds that said policy issued by said defendant to said Fred R. Carfagni on or about June 1, 1930 was a renewal of a policy issued and delivered to him by said defendant on or about June 1, 1929 for the policy period from June 1, 1929 to June 1, 1930; the court further finds that each of said policies issued by defendant to said Fred R. Carfagni on June 1, 1929 and on June 1, 1930 was so issued without any written application having been made or signed by Fred R. Carfagni or any one on his behalf, and said policy of insurance, with said statement numbered 9 in the Schedule of Declarations filled in, as aforesaid, was issued and delivered to said Fred R. Carfagni without said statement having been made by him or by

any one for him, and without the question of whether or not any company had theretofore cancelled or refused to issue any kind of automobile insurance to him being at all mentioned or discussed, and without either said Fred R. Carfagni or any one acting for him knowing, until after June 22, 1931, that said policy contained or purported to contain any statement or answer upon that subject." [113]

"The court further finds that it is true that at the time defendant issued and delivered its policy of insurance on or about May 13, 1931, and also at the times that it issued its prior policies of automobile insurance on or about June 1, 1929 and on or about June 1, 1930, to Fred R. Carfagni, as aforesaid, it had knowledge of the cancellation on or about August 15, 1928 of the policy issued to said Fred R. Carfagni by the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas on or about July 27, 1928, hereinabove referred to; and it is true that defendant, at the time that it issued said policies to said Fred R. Carfagni on or about June 1, 1930 and on or about May 13, 1931, had knowledge of said policy of automobile insurance issued by Washington Underwriters Company to said Fred R. Carfagni on or about October 5, 1928 and knew that said last mentioned policy had been cancelled upon the books of said Washington Underwriters Company on or about June 11, 1929, having theretofore been notified by said Washington Underwriters Company that it had

cancelled said policy because of its bad experience with said Fred R. Carfagni."

"The Court further finds that at the time defendant issued each of said three policies to said Fred R. Carfagni, as aforesaid, containing said statement numbered 9 in the Schedule of Declarations, said defendant knew that said statement contained in each of said policies was not true, and none of said policies was issued in reliance upon or in consideration of the truth or correctness of said statement numbered 9."

"The court further finds that said policy of automobile public liability insurance No. 627670, issued and delivered to Fred R. Carfagni on or about the 13th day of May, 1931, as aforesaid, contained a provision that:

> "'I. Waiver. No provision or condition of this policy shall be waived or altered, except by written endorsement [114] attached hereto and signed by the president or secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the company unless such person, firm or corporation is authorized in writing as such agent by the president or secretary.'

"The court further finds that statement numbered 9 in the Schedule of Declarations of said automobile public liability insurance policy No. 627670, issued by said defendant on or about

May 13, 1931, was not waived or altered in writing or by written endorsement attached to said policy signed by the president or secretary of said defendant, although at the time that said policy was issued by it, said defendant knew that said statement was not true, as hereinabove found by this court."

"The court further finds that on or about said 30th day of June, 1931, defendant tendered and offered to said Fred R. Carfagni the principal amount of the premium paid on or about May 13, 1931 upon said policy; to-wit, $176.82, but that said defendant has never tendered or offered to pay to said Fred R. Carfagni any interest upon said sum."

"The court further finds that during the period that said policy issued by said defendant to Fred R. Carfagni on or about June 1, 1929 was in force and effect, said defendant without objection paid claims made against it under said policy, and that during the period that said policy issued by said defendant to said Fred R. Carfagni on or about June 1, 1930 was in force and effect, said defendant voluntarily paid claims made against it under said policy; and the court further finds that said Lincoln sedan automobile of said Fred C. Carfagni was damaged on June 22, 1931, as the result of the collision in which said Mary Elizabeth Eddy was injured and died, and on or about June [115] 23, 1931, said defendant designated the automobile repair shop at which said Fred R. Carfagni

should have his said automobile repaired, at the expense of said defendant, and said Fred R. Carfagni accordingly had said automobile repaired at said shop, but when the said work upon said automobile was completed, said defendant refused to pay for the same."

"The court finds that it is true that Fred R. Carfagni was the owner of a certain Lincoln sedan automobile from October 5, 1928 to June 22, 1931 and thereafter; that on June 22, 1931, said Fred R. Carfagni, while operating said automobile, caused it to collide with an automobile in which Mary Elizabeth Eddy was riding, and as a result thereof, said Mary Elizabeth Eddy suffered injuries, from which she died; and that thereafter Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, as the only heirs at law surviving Mary Elizabeth Eddy, prosecuted an action against said Fred R. Carfagni in the Superior Court of the City and County of San Francisco to recover damages for the death of said Mary Elizabeth Eddy, caused as aforesaid, and the trial of said action resulted in a judgment on the 2d day of June, 1932, in favor of said heirs of said Mary Elizabeth Eddy and against Fred R. Carfagni in the sum of $15,900, together with costs in the sum of $147.90, which said judgment had become final, and execution thereon had been duly issued and returned by the sheriff of the City and County of San Francisco wholly unsatisfied, prior to the commencement of the above entitled action."

"The court finds that it is true that on or about May 13, 1931, the defendant insurance company, a corporation, of Pittsburgh, Pennsylvania, doing business in California, issued and delivered to Fred R. Carfagni its certain policy of automobile public liability insurance No. 627,670, wherein and whereby said defendant agreed to insure said Fred R. Carfagni against loss all expense resulting from claims upon the assured for damages on [116] account of bodily injuries, including death, resulting from the ownership and/or operation of said Lincoln sedan automobile; that the term of said policy of insurance was from June 1, 1931 to June 1, 1932; that said policy provided that defendant's limit of liability on account of one person injured or killed would be $15,000 together with court costs and interest on a judgment, and that said policy further provided that said defendant was and is bound to the extent of its liability under said policy to pay and satisfy, and protect said Fred R. Carfagni against the levy of execution upon, any final judgment that may be recovered upon any claim covered by said policy as in the policy set forth and limited, and that an action may be maintained upon such judgment by the injured person or persons or such other party or parties in whom the right of action vests to enforce such liability of defendant, as in the policy set forth and limited;"

Said request and motion of said plaintiffs that the court make the findings hereinabove set forth, was denied by the Court on the 22d day of June, 1933, in the absence of both parties and their counsel.

(Exception No. 9).

Thereafter and on said 22d day of June, 1933, in the absence of both parties and their counsel, the court signed and caused to be filed with the clerk, the findings prepared and proposed by said defendant.

(Exception No. 10).

Thereafter and on the 22d day of June, 1933, judgment in said cause was entered by the clerk of the court in favor of defendants and against plaintiffs.

(Exception No. 11).

Thereafter and within the time and in the manner provided by law, plaintiffs duly moved the court for a new trial of said action, which motion was denied on the 15th day of September, 1933. [117]

WHEREFORE, plaintiffs pray that this Bill of Exceptions as prepared and lodged by plaintiffs, be settled and allowed by the Court for use upon plaintiffs' appeal from the judgment rendered in the above entitled action in favor of defendant.

Dated: December 13, 1933.

SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for Plaintiffs.

The foregoing Bill of Exceptions, containing all of the testimony and evidence adduced at the trial of the above entitled action, is hereby settled and allowed, for the purposes of appeal therein taken.

Feby. 5th 1934.

FRANK H. KERRIGAN
District Judge.

Receipt of a copy of the within Bill of Exceptions is hereby admitted this 13th day of December, 1933.

A. E. COOLEY
LOUIS V. CROWLEY
FREDERIC E. SUPPLE
Attorneys for Defendants.

[Endorsed]: Filed Feb 5 1934. [118]

[Title of Court and Cause.]

STIPULATION CONCERNING EXHIBITS

IT IS HEREBY STIPULATED that in preparing and lodging their draft of Bill of Exceptions for use upon appeal from the judgment in the above entitled action, plaintiffs may designate therein the places where copies of exhibits offered and received in evidence shall be inserted, and that said Bill of Exceptions as thus prepared and lodged shall be deemed and considered, and shall be acted upon by the court, the same as though said exhibits were set forth in haec verba, and the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in prepar-

ing the transcript and record on appeal in said cause shall insert a full copy of each exhibit at the place designated in the Bill of Exceptions (as printed in said transcript and record) for the insertion thereof.

Dated: December 13, 1933.

SULLIVAN, ROCHE, JOHNSON & BARRY,
Attorneys for Plaintiffs.

A. E. COOLEY,
LOUIS V. CROWLEY,
FREDERIC E. SUPPLE,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 13, 1933. [119]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Frank H. Kerrigan, Judge of the District Court:

Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, your petitioners, who are the plaintiffs in the above entitled cause, pray that they may be permitted to take an appeal from the judgment entered in the above cause on the 22nd day of June, 1933, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith.

And your petitioners desire that said appeal shall operate as a supersedeas and, therefore, pray that

an order be made fixing the amount of security which said petitioners shall give and furnish upon such appeal, and that upon giving such security, all further proceedings in this court be suspended and stayed until the determination of said appeal by the said Circuit Court of Appeals for the Ninth Circuit.

Dated: December 13th, 1933.

SULLIVAN, ROCHE, JOHNSON & BARRY,

Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 13, 1933. [120]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the plaintiffs in the above entitled action and file the following assignment of errors upon which they will rely in the prosecution of their appeal from final judgment made and entered against them, and each of them, in the above entitled action on the 22nd day of June, 1933:

I.

That the evidence adduced on the trial of said action was and is insufficient to justify or support the decision of the Court and the judgment thereon in favor of defendant and against plaintiffs.

II.

That the evidence was and is insufficient to justify or support the decision of the Court and the

judgment thereon for the reason that the uncontradicted evidence showed and shows that on or about June 5th, 1929, and at the time that defendant issued to Fred R. Carfagni its first automobile insurance policy for the term from June 1st, 1929, to June 1st, 1930, and also on or about May 9th, 1930, and at the time that said defendant issued to said Fred R. Carfagni its renewal of said insurance policy for the term beginning June 1st, 1930, and ending June 1st, 1931, and also on or about May 13th, 1931, and at the time that said defendant issued to said Fred R. Carfagni its renewal of said insurance policy for the term from June 1st, 1931, to June 1st, 1932, said defendant knew, in connection with the issuance of each and all of said three policies of insurance to said Fred R. Carfagni, that other automobile insurance had [121] previously and within three years prior to the date of the issuance of each of said policies been cancelled on said Fred R. Carfagni, and defendant at the time it issued each of said policies to Fred R. Carfagni had full knowledge of all of the matters constituting the alleged breaches of warranty set forth in its answer and upon which it relied for the avoidance of all obligations under the third annual policy issued by it to Fred R. Carfagni on or about May 13th, 1931.

III.

That the evidence was and is insufficient to justify or support the decision of the Court and the judgment thereon for the reason that the uncontradicted

evidence showed and shows that during the period from June 1st, 1929, to June 30th, 1931, said defendant issued three successive automobile insurance policies for the term of one year each, to Fred R. Carfagni on the Lincoln automobile referred to in plaintiffs' complaint; that during said period of time said Fred R. Carfagni had no insurance on said or any other automobile other than that which was issued by said defendant; that all automobile insurance cancelled on said Fred R. Carfagni was issued prior to June 1st, 1929, and was cancelled prior to said date; that said defendant had knowledge of the cancellation of said automobile insurance at the time it issued to Fred R. Carfagni its automobile insurance policy for the term beginning June 1st, 1929, and also at the time that it issued its renewal policy for the year beginning June 1st, 1930, and also at the time that it issued its second renewal policy for the year beginning June 1st, 1931; that said Fred R. Carfagni had losses under the policy issued to him by said defendant for the year beginning June 1st, 1929, and also had losses under the policy issued to him by said defendant for the year beginning June 1st, 1930, [122] and said losses were paid by said defendant prior to May 13th 1931, (the date of the issuance of its third policy to Fred R. Carfagni), with the knowledge of said defendant that said automobile insurance had previously been cancelled on said Fred R. Carfagni, and without any objection whatever upon the part of said defendant,

and without said defendant claiming or attempting to claim that said policies issued by it to Fred R. Carfagni, or any of them, were void or voidable because of any alleged false or untrue statement made by said Fred R. Carfagni concerning the cancellation of automobile insurance previously issued to him, or because of any alleged breach of warranty made by said Fred R. Carfagni to the effect that no company had previously cancelled any automobile insurance on him during the period of three years preceding the issuance of each of said policies.

IV.

That the Court erred in finding and holding that statement numbered 9 in the Schedule of Declarations of the policy of insurance issued by defendant to Fred R. Carfagni under date of May 13th, 1931, reading:

> "9. No company has cancelled or refused to issue any kind of automobile insurance for the assured during the past three years, except as follows: NO EXCEPTIONS."

was untrue, and further erred in finding and holding that said statement number 9 was a material warranty, for the reason that the evidence showed and shows that no such statement or declaration was made or given by said Fred R. Carfagni, and further showed and shows that if said statement or declaration was made or given by him, and/or that the same was untrue, that said defendant knew that it was untrue at the time that the policy was

issued and by reason thereof waived the same, and is estopped from avoiding or attempting [123] to avoid said policy and the obligations thereunder because of the alleged untruth of said statement numbered 9 in said schedule of Declarations.

V.

That the Court erred in holding and finding that said statement numbered 9 in said Schedule of Declarations was a material warranty or a warranty at all, for the reason that the evidence showed and shows that no such statement, declaration or warranty was made or given by said Fred R. Carfagni, and that said defendant knew at the time that said policy was issued and delivered by it of all automobile insurance previously cancelled on said Fred R. Carfagni, and with knowledge of such cancellations itself filled in the answer "no exceptions" to said statement numbered 9.

Va.

That the Court erred in finding and holding that said alleged material warranty in said statement numbered 9 was breached in that the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas, within the period of three years preceding the issuance and delivery of the said policy of May 13th, 1931, cancelled as a bad risk, on or about August 11th, 1928, an automobile insurance policy it had previously issued and delivered to said Fred R. Carfagni on June 27th, 1928; that said Court erred in so finding and holding for the reason that

the evidence showed and shows that said defendant at the time that it issued said policy of May 13th, 1931, to Fred R. Carfagni knew and at all times from and after August 13th, 1928, knew of said date of the issuance and said date of cancellation of said automobile insurance policy by said Home Accident and said Home Fire Insurance Company of Little Rock, Arkansas, to said Fred R. Carfagni, and also knew that said policy had been cancelled [124] because of a bad credit report concerning said Fred R. Carfagni, and not because said Fred R. Carfagni was a bad risk.

VI.

That the Court erred in finding and holding that said alleged material warranty in statement number 9 was breached in that the Travelers Insurance Company cancelled on September 15th, 1928, an automobile insurance policy it had previously issued to Fred R. Carfagni; that the Court so erred for the reason that said finding and holding was entirely outside the issues of said action as made by the pleadings and tried by the Court, and for the further reason that the evidence did not show or tend to show that said Travelers Insurance Company policy was cancelled, but on the contrary showed and shows without contradiction that said policy was not cancelled.

VII.

That the Court erred in finding and holding that said alleged material warranty in statement num-

bered 9 was breached in that the Washington Underwriters Company on or about October 5th, 1928, cancelled a policy of automobile insurance previously issued by it to Fred R. Carfagni on or about September 5th, 1928; that the Court so erred for the reason that said finding and holding was entirely outside the issues as made by the pleadings and tried by the Court, and for the further reason that the evidence did not show or tend to show that said Washington Underwriters Company policy was cancelled, but on the contrary showed and shows without contradiction that said policy was not cancelled.

VIII.

The Court erred in finding and holding that said alleged material warranty in statement numbered 9 was breached in that Western States Insurance Company on or about [125] June 1st, 1929, cancelled a policy of automobile insurance it had previously issued to Fred R. Carfagni; that the Court so erred for the reason that said finding and holding was outside the issues as made by the pleadings and tried by the Court and for the further reason that the evidence did not show or tend to show that said Western States Insurance Company policy was cancelled, but on the contrary showed and shows without contradiction that said policy was not cancelled; and said Court erred in so finding and holding for the further reason that the evidence showed that if said Western States Insurance Policy to Fred R. Carfagni was cancelled, it

was cancelled on June 11th, 1929, and said defendant had knowledge of the cancellation thereof, and of the reason for such cancellation from and after September 2nd, 1929, and at the time that it issued its first renewal policy to Fred R. Carfagni on May 9th, 1930, and at the time that it issued its second renewal policy to said Fred R. Carfagni on May 13th, 1931.

IX.

The Court erred in finding and holding that on or about June 1st, 1929, Fred R. Carfagni by and through his agent falsely represented to defendant that there had been no losses or cancellations by any other company, and that it was in order for said company to write up said policy of automobile insurance for the reason that there was and is no evidence sufficient to justify or support said finding, or any part thereof; and for the further reason that if the evidence showed or shows that said representation and statement was made, the evidence further showed without conflict that the statement was not false or untrue; and for the further reason that if the evidence showed that said statement and representation was made and that the same was false and [126] untrue, the evidence further showed that the statement was not relied or acted upon by said defendant at the time that it issued the original policy of June 1st, 1929, or either of the subsequent two policies, as defendant knew at all of said times of the policies of automobile insurance previously issued to said Fred R. Carfagni which

had been cancelled within three years prior to the date of each of defendant's policies to said Fred R. Carfagni, and also knew of the reasons for such cancellations.

X.

That the Court erred in finding and holding that the automobile insurance policy of defendant issued and delivered to Fred R. Carfagni on or about May 13th, 1931, was renewed and based upon the information and statements contained in the first automobile insurance policy issued and delivered by the defendant to Fred R. Carfagni on or about June 1st, 1929, for the reason that the evidence was and is insufficient to support or justify said finding; and for the further reason that the evidence showed and shows that at the time that said policy of May 13th, 1931, was issued and delivered to Fred R. Carfagni said defendant knew that the answer "No Exceptions" to statement numbered 9 in the Schedule of Declarations in said first policy issued by it to Fred R. Carfagni was not correct in that automobile insurance issued to Fred R. Carfagni had been cancelled within three years prior to the date of the issuance and delivery of said policy; and for the further reason that immediately prior to May 13th, 1931, said defendant had approximately two years experience with Fred R. Carfagni as an assured under automobile insurance policies, and said defendant issued its said policy of May 13th, 1931, based entirely upon its own experience with said Fred R. Carfagni and without

considering at [127] all the answer "No Exceptions" to said statement numbered 9 in the schedule of declarations contained in its original policy to Fred R. Carfagni.

XI.

The Court erred in holding and finding that defendant had knowledge of the cancellation of a policy of Pacific Employers Insurance Company to Fred R. Carfagni within three years prior to May 13th, 1931, for the reason that there was and is no evidence whatever to justify or support said finding.

XII.

The Court erred in finding and holding that defendant did not have any knowledge concerning the details, or the particular reasons which caused said automobile insurance companies to cancel out the policies of said Fred R. Carfagni for the reason that there was and is no evidence sufficient to justify or support said finding or any part thereof; and for the further reason that the evidence showed and shows without contradiction that defendant knew the particular reasons for the cancellation of any and all automobile insurance policies issued to said Fred R. Carfagni prior to May 13th, 1931, and cancelled by the companies issuing the same.

XIII.

The Court erred in finding and holding as follows:

"The Court further finds that the defendant did not have any knowledge at the time it is-

sued and delivered its policy of automobile insurance of May 13th, 1931, to Fred R. Carfagni concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Travelers Insurance Company on or about September 15th, 1928; that the defendant did not have any knowledge concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Washington Underwriters Company on or about October 5th, 1928; that the defendant did not have any knowledge concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Western States Insurance Company on or about June 1st, [128] 1929; that the aforesaid cancellations made by the Travelers Insurance Company, Washington Underwriters Company, and Western States Insurance Company without the knowledge of the defendant were all made within said three year period prior to May 13th, 1931."

for the reason that the evidence was and is insufficient to justify or support said findings or any part thereof; and for the further reason that said findings and the whole thereof were outside the issues as made by the pleadings and tried by the Court; and for the further reason that there was no evidence showing or tending to show that any of said policies issued to Fred R. Carfagni by Travelers Insurance Company, Washington Underwriters Company, and Western States Insurance Company was cancelled within, or under the terms of

said policies, or otherwise, or at all; and for the further reason that the uncontradicted evidence showed and shows that if said policy issued by the Western States Insurance Company to Fred R. Carfagni was cancelled on or about June 1st, 1929, said defendant had notice and knowledge of the cancellation thereof, and the reason for such cancellation from and after September 2nd, 1929, and at the time that it issued its first renewal policy to said Fred R. Carfagni on May 8th, 1930, and at the time that it issued its second renewal policy on May 13th, 1931.

XIV.

The Court erred in finding and holding that no provision or condition of said automobile public liability insurance policy No. 627,670 issued by defendant to Fred R. Carfagni on or about May 13th, 1931, was ever waived or altered for the reason that there was and is no evidence to justify or support said finding; and for the further reason that the evidence showed and shows that said defendant at the time that it issued said policy and also at the times that it issued its [129] previous policies of June 5th, 1929 and May 8th, 1930, to said Fred R. Carfagni, knew that automobile insurance had been cancelled on said Fred R. Carfagni within three years prior to the issuance of each of said policies, and the reasons for such cancellations; and also knew that the answer "No Exceptions" to said statement numbered 9 in the Schedule of Declarations of each of said policies was and would be in-

correct for said reason, and yet inserted said answer "No Exceptions" in answer to said statement numbered 9 in each of said policies and issued said policies with said answer "No Exceptions" therein, thereby waiving the entire subject matter of said statement number 9 in said Schedule of Declarations of each of said policies; and for the further reason that said defendant waived the subject matter of said statement numbered 9 and agreed to issue and did issue each of its said three policies to said Fred R. Carfagni even though said Fred R. Carfagni had automobile insurance cancelled on all within three years prior to the date of each of said policies.

XIV.

The Court erred in finding and concluding that defendant did not waive the requirements of the following provision of the policy of automobile insurance issued by it to Fred R. Carfagni on May 13th, 1931, to wit:

> "I. Waiver. No provision or condition of this policy shall be waived or altered, except by written endorsement attached hereto and signed by the president or secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the company unless such person, firm or corporation is authorized in writing as such agent by the president or secretary."

for the reason that there was and is no evidence to justify or support said finding; and for the further reason that the evidence showed and shows tha the said provision of said [130] policy and the requirements or said provision were waived by said defendant.

XV.

The Court erred in finding and holding as follows:

> "The Court further finds that by reason of said false warranty contained in said statement numbered 9 of said Schedule of Declarations and by reason of the breach of said material warranty, the said policy of automobile insurance No. 627,670 became and was void from its date of issuance and said policy never attached to any of the risks therein mentioned."

for the reason that there was and is no evidence sufficient to justify or support said finding that any false warranty was contained in said statement numbered 9, or that there was any breach of said or any material warranty; and for the further reason that the evidence showed and shows that said policy was at all times in full force and effect from the date of its issuance on May 13th, 1931, until some time after June 22nd, 1931, and that said policy attached to all of the risks therein mentioned, including the risk connected with the automobile accident which Fred R. Carfagni had on June 22nd, 1931, as a result of which accident Mary Elizabeth Eddy died.

XVI.

The Court erred in finding and holding that the defendant did not accept or assume at any time any liability under said automobile insurance policy issued and delivered to said Fred R. Carfagni on or about May 13th, 1931, for the reason that the evidence was and is insufficient to justify or support said finding; and for the further reason that the evidence showed and shows without contradiction that immediately following said automobile accident on June 22nd, 1931, as a result of which said Mary Elizabeth Eddy died, said defendant directed said Fred R. Carfagni to have his automobile repaired at an automobile repair shop selected and designated by said defendant, and said automobile was repaired at said [131] shop because of said direction from said defendant; and for the further reason that the evidence showed and shows that said defendant accepted and assumed all liability under said automobile insurance policy issued and delivered to said Fred R. Carfagni on or about May 13th, 1931, continuously thereafter until June 30th, 1931, and said defendant considered and treated said policy as in full force and effect during all said period, even though said defendant knew at the time that the policy was issued on May 13th, 1931, and for more than two years prior to said date that the answer "No Exceptions" to statement numbered 9 of the Schedule of Declarations in said policy was not correct, because Fred R. Carfagni had insurance policies cancelled on him within three years prior to May 13th, 1931.

XVII.

That the Court erred in concluding that plaintiffs should take nothing by their complaint and that defendants were and are entitled to judgment against plaintiffs for the reason that the evidence was and is insufficient to justify or support a judgment in favor of said defendant or any judgment other than one in favor of said plaintiffs.

XVIII.

The Court erred in finding and concluding that defendant did not waive the alleged breaches of warranty referred to in defendant's answer for the reason that the evidence was and is insufficient to justify or support said finding, and for the reason that the uncontradicted evidence shows that said defendant did waive each and all alleged breaches of warranty.

XIX.

That the Court erred in finding and holding that defendant was not estopped from avoiding liability to [132] plaintiffs on the insurance policy referred to in plaintiff's complaint on the ground of the alleged breaches of warranty referred to in defendant's answer for the reason that the evidence was and is insufficient to justify or support said finding, and for the further reason that the uncontradicted evidence shows that defendant was and is estopped from avoiding or attempting to avoid liability on said policy on the ground of said alleged breaches of warranty as said defendant had full

knowledge of said alleged breaches of warranty at the time that it issued said policy to Fred R. Carfagni.

XX.

That the Court erred in finding and concluding that defendant in attempting to avoid liability on the insurance policy referred to in plaintiff's complaint was not estopped from relying upon or proving failure to comply with the provisions of said insurance policy set forth in assignment XIV hereinbefore for the reason that the evidence was and is insufficient to support or justify said finding, and for the further reason that the uncontradicted evidence shows that said defendant was and should be estopped from relying upon or proving failure to comply with said provision of said policy.

XXI.

That the Court erred in rejecting the following amendments proposed by plaintiffs to defendant's proposed findings of fact and conclusions of laws, to wit:

> "Concerning said statement numbered 9 in said Schedule of Declarations, the court finds that the Home Accident and Home Fire Insurance Company of Little Rock Arkansas on July 27, 1928, issued a policy of automobile insurance to Fred R. Carfagni, which said policy of insurance was cancelled by it on August 14, 1928, because of a bad credit report which it had then and there received and obtained concerning said Fred R. Carfagni; and the court fur-

ther finds that Washington Underwriters Company (of which Western [133] States Insurance Company was general agent) issued an automobile insurance policy to said Fred R. Carfagni on October 5, 1928, the date upon which he became the owner of said Lincoln sedan automobile, and that said policy remained in effect until June 1, 1929, on which date the first policy of automobile public liability insurance issued by said defendant to said Fred R. Carfagni went into effect, as hereinafter stated. Prior to said 1st day of June, 1929, said Washington Underwriters Company requested the insurance broker for said Fred R. Carfagni to place the insurance of said Fred R. Carfagni in another company, and because of said request, said policy of June 1, 1929, was obtained from and issued by defendant, and thereafter and on June 11, 1929, said Washington Underwriters Company cancelled its said policy of October 5, 1928, upon its books without giving any notice of cancellation to said Fred R. Carfagni or to any one on his behalf.

The Court further finds that it is not true that Fred R. Carfagni or any one acting for him, in procuring or accepting the policy of insurance issued to him on May 13, 1931, represented or warranted to defendant that no company had cancelled or refused any kind of automobile insurance theretofore issued to him. In this behalf the court finds that said policy of insurance issued by said defendant to said Fred

R. Carfagni on May 13, 1931, was so issued without any written application having been made or signed by Fred R. Carfagni or any one on his behalf, and said policy of insurance with said statement numbered 9 in said Schedule of Declarations filled in, as aforesaid, was issued and delivered to said Fred R. Carfagni without said statement having been made or answered by him or any one for him and without the question of whether or not any company had theretofore cancelled or refused to issue automobile insurance to him being at all mentioned or discussed, and without either said Fred R. Carfagni or any one acting for him knowing, until after June 22, 1931, that said policy contained or purported to contain any statement or answer upon that subject."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

XXII.

That the Court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to wit:

"The court further finds that said automobile insurance policy issued and delivered by defendant to Fred R. Carfagni on or about May 13, [134] 1931, was for the policy period from June 1, 1931, to June 1, 1932, and was a renewal of a policy issued and delivered to him

by said defendant on or about June 1, 1930, for the policy period from June 1, 1930, to June 1, 1931; and the court further finds that said policy issued by said defendant to said Fred R. Carfagni on or about June 1, 1930, was a renewal of a policy issued and delivered to him by said defendant on or about June 1, 1929, for the policy period from June 1, 1929, to June 1, 1930; the court further finds that each of said policies issued by defendant to said Fred R. Carfagni on June 1, 1929, and on June 1, 1930, was so issued without any written application having been made or signed by Fred R. Carfagni or any one on his behalf, and said policy of insurance, with said statement numbered 9 in the Schedule of Declarations filled in, as aforesaid, was issued and delivered to said Fred R. Carfagni without said statement having been made by him or by any one for him, and without the question of whether or not any company had theretofore cancelled or refused to issue any kind of automobile insurance to him being at all mentioned or discussed, and without either said Fred R. Carfagni or any one acting for him knowing, until after June 22, 1931, that said policy contained or purported to contain any statement or answer upon that subject."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

XXIII.

That the Court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to wit:

"The court further finds that it is true that at the time defendant issued and delivered its policy of insurance on or about May 13, 1931, and also at the time that it issued its prior policies of automobile insurance on or about June 1, 1929, and on or about June 1, 1930, to Fred R. Carfagni, as aforesaid, it had knowledge of the cancellation on or about August 15, 1928, of the policy issued to said Fred R. Carfagni by the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas on or about July 27, 1928, hereinabove referred to; and it is true that defendant, at the time that it issued said policies to said Fred R. Carfagni on or about June 1, 1930, and on or about May 13, 1931, had knowledge of said policy of automobile insurance issued by Washington Underwriters Company to said Fred R. Carfagni on or about October 5, 1928, and knew that said last mentioned policy had terminate on June 1, 1929, as aforesaid, and also knew that said policy had been cancelled upon the [135] books of said Washington Underwriters Company on or about June 11, 1929, having theretofore been notified by said Washington Underwriters Company that it had can-

celled said policy because of its bad experience with said Fred R. Carfagni.

The court further finds that at the time defendant issued each of said three policies to said Fred R. Carfagni, as aforesaid, containing said statement numbered 9 in the Schedule of Declarations, said defendant knew that said statement contained in each of said policies was not true, and none of said policies was issued in reliance upon or in consideration of the truth or correctness of said statement numbered 9."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

XXIV.

That the Court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to wit:

"The court further finds that statement numbered 9 in the Schedule of Declarations of said automobile public liability insurance policy No. 627670, issued by said defendant on or about May 13, 1931, was not waived or altered in writing or by written endorsement attached to said policy signed by the president or secretary of said defendant, although at the time that said policy was issued by it, said defendant knew that said statement was not true, as hereinabove found by this court.

* * * * * * *

> The court further finds that on or about said 30th day of June, 1931, defendant tendered and offered to said Fred R. Carfagni the principal amount of the premium paid on or about May 13, 1931, upon said policy; to wit, $176.82, but that said defendant has never tendered or offered to pay to said Fred R. Carfagni any interest upon said sum."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

XXV.

That the Court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed [136] findings of fact and conclusions of law, to wit:

> "The court further finds that during the period that said policy issued by said defendant to Fred R. Carfagni on or about June 1, 1929, was in force and effect, said defendant without objection paid claims made against it under said policy, and that during the period that said policy issued by said defendant to said Fred R. Carfagni on or about June 1, 1930, was in force and effect, said defendant voluntarily paid claims made against it under said policy; and the court further finds that said Lincoln sedan automobile of said Fred R. Carfagni was damaged on June 22, 1931, as the result of the collision in which said Mary Elizabeth Eddy

was injured and died, and on or about June 23, 1931, said defendant designated the automobile repair shop at which said Fred R. Carfagni should have his said automobile repaired, at the expense of said defendant, and said Fred R. Carfagni accordingly had said automobile repaired at said shop, but when the said work upon said automobile was completed, said defendant refused to pay for the same."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

XXVI.

The Court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed Findings of Fact and Conclusions of Law, to wit:

"The court finds that it is true that Fred R. Carfagni was the owner of a certain Lincoln automobile from October 5, 1928 to June 22, 1931 and thereafter; that on June 22, 1931, said Fred R. Carfagni, while operating said automobile, cause it to collide with an automobile in which Mary Elizabeth Eddy was riding, and as a result thereof, said Mary Elizabeth Eddy suffered injuries, from which she died; and that thereafter Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, as the only heirs at law surviving Mary Elizabeth Eddy, prosecuted an action against

said Fred R. Carfagni in the Superior Court of the City and County of San Francisco to recover damages for the death of said Mary Elizabeth Eddy, caused as aforesaid, and the trial of said action resulted in a judgment on the 2nd day of June, 1932, in favor of said heirs of said Mary Elizabeth Eddy and against Fred R. Carfagni in the sum of $15,900, together with costs in the sum of $147.90, which said judgment had become final, and execution thereon had been duly issued and returned by the sheriff of the City and County of San Francisco wholly unsatisfied, prior to the commencement [137] of the above entitled action.

The court finds that it is true that on or about May 13, 1931, the defendant insurance company, a corporation, of Pittsburgh, Pennsylvania, doing business in California, issued and delivered to Fred R. Carfagni its certain policy of automobile public liability insurance No. 627670, wherein and whereby said defendant agreed to insure said Fred R. Carfagni against loss and all expenses resulting from claims upon the assured from damages on account of bodily injuries, including death, resulting from the ownership and/or operation of said Lincoln sedan automobile; that the term of said policy of insurance was from June 1, 1931 to June 1, 1932; that said policy provided that defendant's limit of liability on account of one person injured or killed would be $15,000

together with court costs and interest on a judgment, and that said policy further provided that said defendant was and is bound to the extent of its liability under said policy to pay and satisfy and protect said Fred R. Carfagni against the levy of execution upon, any final judgment that may be recovered upon any claim covered by said policy as in the policy set forth and limited, and that an action may be maintained upon such judgment by the injured person or persons or such other party or parties in whom the right of action vests to enforce such liability of defendant, as in the policy set forth and limited."

XVII.

That the evidence was and is insufficient to justify or support the decision of the Court and the judgment thereon, for the reason that the uncontradicted evidence showed and shows that at all times from and after August 13, 1928, defendant knew that within three years prior to the 5th day of June, 1929 and/or within three years prior to the 13th day of May, 1931, automobile insurance theretofore issued to Fred R. Carfagni had been cancelled or refused to him; that defendant well knew that Fred R. Carfagni at all times from and after June 5, 1929 believed and considered that he was insured with defendant, and acting under such belief, thereafter duly paid insurance premiums to defendant; that defendant, although knowing of said belief of

said Fred R. Carfagni, accepted said premiums from him; and that defendant [138] well knew Fred R. Carfagni would not have paid any of said premiums, had he known or believed that defendant would seek to avoid liability upon its policies of insurance to him or any thereof, by reason of the facts alleged in defendant's answer.

XVIII.

That the court erred in overruling the objection of plaintiffs to the introduction in evidence of defendant's exhibit B, which objection was as follows:

"Mr. BARRY: I urge the objection that they are immaterial, irrelevant and incompetent; that if they are for the purpose of showing cancellation, may it please your Honor, they do not show it; if they are for any other purpose, they are entirely immaterial, because this case is not being tried upon so-called confidential reports received by the Home Accident Company, and the only pertinency of the whole matter is whether the Home Accident Company did cancel the policy of insurance at or about the time already mentioned.

The COURT: Overruled; exception.

Mr. BARRY: Has your Honor seen these statements, as far as the subject-matter of them is concerned?

The COURT: No, but I will admit them."

XIX.

The Court erred in overruling the objection of plaintiffs to the following testimony elicited from witness Richard Arnberger; viz.:

"Q. Now, I will ask you, Mr. Arnberger, whether at any time in 1930 or 1931, under your invariable practice, you had placed upon your desk any index cards of Dr. Fred R. Carfagni with any I. C. C. A. cards?

Mr. BARRY: The question is objected to on the ground that it is immaterial. It is not a question of what was placed on his desk. It is a question of whether there was information at the National Union.

The COURT: Yes; nevertheless, I will overrule the objection. Exception.

A. I have no recollection of ever having received the index card and I. C. C. A. card on Dr. Fred R. Carfagni." [139]

XX.

That the court erred in denying plaintiffs' motion made at the close of the evidence, and before the cause was argued or submitted for decision, for judgment in favor of plaintiffs, upon the ground that the evidence was and is insufficient to justify or support a judgment for defendant or any judgment other than one in favor of plaintiffs.

XXI.

That the court erred in concluding and deciding as follows:

"If this case were being tried in the California State Court, I should be bound to hold that issuance of a policy with the knowledge of prior cancellations, constituted a waiver of declaration No. 9 in the policy, and that plaintiffs should recover. Since, however, this is a case in the Federal Court, I am bound by the law as declared by the United States Supreme Court that such warranty can only be waived by a writing executed by the proper officers of the insurance company. There is no such writing introduced in evidence in this case, plaintiffs are not entitled to recover."

XXII.

That the Court erred in giving and making its judgment in favor of defendant and against plaintiffs, for the reason that the special Findings made by the court do not justify or support said judgment and will not justify or support any judgment, other than one in favor of plaintiffs.

WHEREFORE, plaintiffs pray that said judgment be reversed, and that this court remand said cause to the District Court of the United States, in and for the Northern District of California, Southern Division, with the direction that said court enter its judgment therein in favor of plaintiffs, in accordance with the prayer of their complaint.

Dated: December 13, 1933.

SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec 13 1933 [140]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL WITH SUPERSEDEAS

The petition of the plaintiffs in the above entitled cause from the final judgment heretofore entered in favor of the above named defendant is hereby granted, and the appeal is allowed; and upon petitioners filing a bond in the sum of $250.00 with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas on said judgment made and entered in the above cause and shall suspend and stay all further proceedings in this court until the termination of said appeal by the Circuit Court of Appeals for the Ninth Circuit.

Dated: December 13th, 1933.

FRANK H. KERRIGAN
District Judge.

[Endorsed]: Filed Dec 14 1933 [141]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, as principals and Pacific Indemnity Company, as sureties, are held and firmly bound unto National Union Indemnity Company, a corporation, in the full and just sum of Two hundred fifty and no/100ths dollars, to be paid to the said National Union Indemnity Com-

pany, a corporation, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of December, in the year of our Lord One Thousand Nine Hundred and thirty-three.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said Court, between Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, as plaintiffs, and National Union Indemnity Company, a corporation, as defendant, a judgment was rendered against the said plaintiffs and the said plaintiffs having obtained from said Court an order allowing appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said National Union Indemnity Company, a corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now, the condition of the above obligation is such, That if the said Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea

good, then the above obligation to be void; else to remain in full force and virtue.

PACIFIC INDEMNITY COMPANY

[Seal] By MORRIS B. ROTHHOLZ

Attorney-in-fact

Acknowledged before me the day and year first above written.

.....

MBR The Surety herein expressly agrees that in case of any breach of any condition of this bond, the Court may, upon notice to such Surety of not less than ten days, proceed summarily in the above entitled action to ascertain the amount which such Surety is bound to pay on account of such breach and render judgment therefore against it and award execution therefor.

State of California,
County of Sacramento—ss.

On this 13th day of December in the year one thousand nine-hundred and thirty-three, before me, ... a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Morris B. Rothholz known to me to be the duly authorized Attorney-in-Fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said Morris B. Rothholz acknowledged to me that he subscribed

the name of PACIFIC INDEMNITY COMPANY, thereto as principal, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by official seal the day and year in this Certificate first above written.

[Seal] RITA DARIAN

Notary Public in and for Sacramento County, State of California

[Endorsed]: Filed Dec. 14, 1933. [142]

[Title of Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT ON APPEAL FROM JUDGMENT

To the Clerk of the District Court of the United States, Northern District of California:

You are hereby requested, in transmitting a true copy of the record of the United States District Court, Northern District of California, in the above entitled cause pursuant to the appeal of the plaintiff and appellant from the judgment entered on the 22nd day of June, 1933, to incorporate into the transcript of record on such appeal the following portions of the record in said cause in your office, to wit:

1. Original complaint;
2. Original summons;
3. Answer;
4. Memorandum of Court made March 1, 1933;

5. Findings of fact and conclusions of law;
6. Judgment;
7. Bill of exceptions;
8. Stipulation concerning exhibits;
9. Petition for appeal;
10. Assignment of errors;
11. Order allowing appeal;
12. Bond;
13. Citation;
14. This praecipe.

Dated: December 18th, 1933.

SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for Plaintiff and Appellant.

Receipt of a copy of the within is hereby admitted this 19th day of December, 1933.

COOLEY, CROWLEY & SUPPLE
Attorneys for Defendants.

[Endorsed]: Filed Dec 19 1933 [143]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 143 pages, numbered from 1 to 143, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of ALBERT Z. EDDY, et al. vs. NATIONAL UNION INDEMNITY COMPANY, No. 19322-K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $39.50 and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of February A. D. 1934.

[Seal] WALTER B. MALING
Clerk.

J. P. WALSH
Deputy Clerk. [144]

[Title of Court and Cause.]

CITATION ON APPEAL

United States of America, ss:

The President of the United States of America
To National Union Indemnity Company, a corporation, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, are appellants, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California this 13th day of December, A. D. 1933.

FRANK H. KERRIGAN
United States District Judge.

[Endorsed]: Filed Dec. 14, 1933 [145]

[Endorsed]: No. 7394. United States Circuit Court of Appeals for the Ninth Circuit. Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, Appellants, vs. National Union Indemnity Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 7, 1934.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

2

No. 7394

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT Z. EDDY, ALBERT P. EDDY, RAYMOND E. EDDY and GLADYS KANE,

Appellants,

vs.

NATIONAL UNION INDEMNITY COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

SULLIVAN, ROCHE, JOHNSON & BARRY,
THEO. J. ROCHE,
EDWARD I. BARRY,
EUSTACE CULLINAN, JR.,
Mills Tower, San Francisco,
Attorneys for Appellants.

BERNAL-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 7394

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT Z. EDDY, ALBERT P. EDDY, RAYMOND E. EDDY and GLADYS KANE,

Appellants,

vs.

NATIONAL UNION INDEMNITY COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

This is an action brought by appellants upon a certain policy of public liability insurance No. 627,670 issued by the appellee insurance company to Dr. Fred R. Carfagni on June 1, 1931. The appellants on June 22, 1932, obtained a judgment for $15,900 and $147.90 as costs, against Dr. Fred R. Carfagni in the Superior Court of the State of California in and for the City and County of San Francisco, and having been unable to satisfy the judgment out of any assets of Dr. Carfagni, they are seeking to recover against his insurer, the appellee herein.

The controversy herein is principally over the legal effect of the following declaration and answer thereto, contained in the policy:

> "9. No company has cancelled or refused to issue any kind of automobile insurance for the Assured during the past three years, except as follows: No exceptions." (Tr. p. 31.)

The appellee proved at the trial that within three years prior to June 1, 1931, the date on which the policy sued upon herein went into effect, two other insurance companies had cancelled policies of insurance theretofore issued by them to Dr. Carfagni. It is the contention of the appellants that Dr. Carfagni committed no breach of warranty and that even though in legal effect he were held to have done so, the appellee by its knowledge and conduct waived, and is estopped from setting up, any alleged breach of warranty by Doctor Carfagni in connection with the foregoing declaration No. 9. The appellee seeks to avoid the legal effect of its conduct and knowledge of the true facts by relying upon the following provision of the policy:

> "I. Waiver. No provision or condition of this policy shell be waived or altered, except by written endorsement attached hereto and signed by the President or Secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the Company unless such person, firm or corporation is authorized in writing as such agent by the President or Secretary."

The Judge of the trial court in his memorandum opinion (Tr. p. 16) and in his findings (Tr. p. 21)

declared that the appellee, at the time it issued the policy sued upon herein to Dr. Carfagni, "had knowledge of the cancellations" of two other policies of insurance which had been issued to Dr. Carfagni within three years prior to the date when the appellee issued its last policy to him. The trial judge further declared in his opinion that if the case were to be decided by the laws of the State of California as declared by our state courts, he would have been constrained to decide in favor of the appellants, but by reason of the rule of the federal jurisdictions he was compelled to decide in favor of the appellee because the appellants produced no writing signed by the president or secretary of the appellee corporation authorizing a waiver of any provisions of the policy.

The appellants are confident that the facts of this case, developed at the trial to a large extent by the testimony of witnesses who were in the employ of the appellee corporation, clearly establish that there was no breach of warranty committed by Doctor Carfagni, and that even if in legal contemplation he were held to have made a false warranty, the knowledge and conduct of the appellee either waived it or estopped the appellee from relying upon it as a defense to this action.

I.

STATEMENT OF FACTS.

The plaintiffs and appellants are the heirs of Mary Elizabeth Eddy who died on June 22, 1931, as the

result of an automobile accident caused by the alleged negligence of the assured, Dr. Fred R. Carfagni. An action for her wrongful death was thereafter instituted by the appellants as said heirs, and on June 22, 1932, a judgment was rendered in favor of the appellants and against Fred R. Carfagni in the sum of $15,900, together with costs in the sum of $147.90. (Tr. p. 59.) That judgment is final and was final on the date upon which the present action was instituted. No part of the judgment has been paid to the appellants herein, and prior to the commencement of this action, the appellants caused a writ of execution to be issued out of the Superior Court of the State of California, in and for the City and County of San Francisco, and directed against Fred R. Carfagni. Prior to the institution of this action, moreover, the writ was returned with the endorsement of the Sheriff of the City and County of San Francisco thereon, showing that after proper search he was unable to find any property belonging to Fred R. Carfagni. (Tr. p. 59.)

At the time of the accident (Tr. p. 60), Dr. Carfagni owned and was driving a Lincoln sedan automobile. On June 1, 1931, approximately three weeks before the occurrence of the accident, the appellee corporation had issued to Doctor Carfagni its policy of public liability insurance No. 627,670 (Tr. 29-57; Plaintiffs' Exhibit 1.) Under the terms of this policy the defendant agreed to indemnify Dr. Fred R. Carfagni from any legal liability to others for bodily injury accidentally sustained, including death at any time resulting therefrom, on account of any accident

due to the ownership, maintenance or use of said automobile. The policy of automobile public liability insurance further provided that the limit of liability of the appellee corporation on account of one person injured or killed should be $15,000, together with court costs and interest, and that the limit of liability of the appellee corporation for one accident should be $30,000. The period covered by the policy was from June 1, 1931, until June 1, 1932.

After the accident which occurred on June 22, 1931, Doctor Carfagni reported it by telephone to Mr. E. H. Payne (Tr. 104), the insurance broker through whom he had placed the policy. On the morning of June 23, 1931, the day after the accident, a complete report of the accident was given to the appellee, and a representative of the appellee insurance company took Dr. Carfagni's car to Larkin & Company, an automobile repair shop, for the purpose of having the Lincoln sedan restored to good condition. (Tr. p. 105.) About one week afterward, a representative of the appellee corporation informed Mr. Payne, who was Dr. Carfagni's broker, that the appellee corporation was denying liability because of a misrepresentation alleged to have been made by Dr. Carfagni at the time he applied to the appellee insurance company for a policy of public liability insurance issued to him on *June 1, 1931.* The appellee thereupon refused to pay the bill for the repair work which it had ordered Larkin & Company to make on Dr. Carfagni's Lincoln sedan automobile, and so Dr. Carfagni was compelled to pay the bill. On June 30, 1931, defendant sent by registered mail to Dr.

Carfagni a purported notice of cancellation of the policy of public liability insurance which it had issued to Dr. Carfagni on June 1, 1931, and enclosed its check in the sum of $176.82, representing the amount of the premium, without interest, which Dr. Carfagni previously had paid the defendant upon that policy. (Tr. p. 175, Defendant's Exhibit J.) Dr. Carfagni, however, refused to accept from the letter carrier the purported notice of cancellation or the offer of the return of the premium upon the policy.

The policy of public liability insurance issued by the appellee corporation to Dr. Carfagni on June 1, 1931, and which is sued upon herein, contains the following statement and answer in its schedule of declarations:

> "9. No company has cancelled or refused to issue any kind of automobile insurance for the Assured during the past three years, except as follows: No exceptions."

On August 11, 1928, the Home Accident Insurance Company had cancelled a policy of automobile public liability insurance, theretofore issued by it to Dr. Fred R. Carfagni. (Tr. pp. 141, 142; Defendant's Exhibit H) because of a "bad credit report" of the assured. (Tr. p. 227; Plaintiffs' Exhibits 7 and 8.) It is further conceded by appellants that on June 11, 1929, either the Pacific Employers Insurance Company or the Washington Underwriters, for both of which companies Mullin & Acton, were general agents, because of a "bad experience," cancelled a policy of automobile public liability insurance theretofore is-

sued to Fred R. Carfagni. (Tr. p. 232, Plaintiffs' Exhibits 9 and 10.) There was some slight confusion as to whether the policy of insurance numbered 26,543, which was issued to Dr. Carfagni on October 5, 1928, and which would have expired on October 5, 1929, was in the Pacific Employers Insurance Company or the Washington Underwriters. In any event appellants freely concede that the policy of insurance bearing that number and issued on October 5, 1928, by either of these two companies to Dr. Carfagni, was cancelled on January 11, 1929, because of "bad experience". (Plaintiffs' Exhibit No. 9 and 10; Tr. pp. 232, 236.)

The policy issued by the appellee corporation to Doctor Carfagni on June 1, 1931, and upon which the appellants sue herein, was the *third* policy issued by said appellee insurance company to Dr. Carfagni. The first policy was issued by it to Dr. Carfagni on or about June 5, 1929, and was placed through his broker, Mr. E. H. Payne. Dr. Carfagni paid his full premium and the policy ran one year to completion. Although Mr. Payne was originally of the impression that he placed the policy directly with Mr. Philip P. Sullivan, who was then in general charge of the appellee's automobile indemnity department, it developed that the policy had been issued upon the request of Mr. Payne, by Leo Pockwitz Co. Inc., the general agents for the appellee. At the time the appellee corporation issued its policy of automobile public liability insurance to Dr. Carfagni on June 1, 1929, Mr. Payne, the broker, only told the agents

of the appellee the name, address and occupation of the assured, the kind, model and engine number, of his automobile, and the limits of liability. (Tr. pp. 99, 239, 240.) At the time that application was made on behalf of Dr. Carfagni to appellee for the issuance of the first policy of insurance to Dr. Carfagni in June, 1929, no statement was made by Mr. Payne or anyone else as to whether there had been cancellations or prior insurance to Dr. Carfagni, and the subject of prior insurance issued was not then discussed. (Tr. pp. 99, 239, 240.)

The testimony of Miss Hearney presented some conflict as to what was said by Mr. Payne at the time that he placed the order for the first policy issued by the National Union Indemnity Company to Dr. Fred R. Carfagni in June, 1929. She at the time was employed as an automobile underwriter for Leo Pockwitz Co. Inc., who were general agents for the National Union Indemnity Company. (Tr. p. 148.) Her testimony on direct examination was that Mr. Payne had placed the insurance with her over the telephone, and that when she was satisfied that the risk was in order, she wrote up the policy. (Tr. p. 143.) We submit that this testimony represents the limit of Miss Hearney's recollection concerning this order, which was taken over the telephone, four years before the trial of this case, and which constituted a small part of her daily routine work for Leo Pockwitz Co. Inc. Upon her cross-examination, however, Miss Hearney purported to give the exact substance of the conversation which she had with Mr. Payne.

(Tr. p. 150.) She testified that as she was taking the order, the name of the assured struck her as most peculiar, and she questioned it; that the date upon which the automobile was purchased was in October, 1928, and that raised a question in her mind, until Mr. Payne told her that it was all right, because there had not been any losses from the time that the Lincoln sedan was purchased until the date the insurance was placed. (Tr. p. 150.) Up to this point she did not testify that anything was asked or said concerning the cancellation or refusal of prior insurance. Later on, however, she declared that Mr. Payne told her at the time of applying for the first policy issued by the appellee company to Dr. Carfagni in 1929, that the risk was in order, and that no prior insurance had been cancelled or refused to Dr. Carfagni.

That Mr. Payne did not make any such statements to Miss Hearney is demonstrated by what occurred at the office of the appellee company. After this first policy was issued to Dr. Carfagni, the so-called "daily" of that policy was sent by Leo Pockwitz Co. Inc., the general agents for the appellee, to the National Union Company office, without any memorandum relating to the discrepancy of the purchase date of the automobile and the date upon which the policy was issued. (Defendant's Exhibit F.) Mr. Arnberger testified that he examined this "daily" (Tr. p. 202) some time between June 14 and June 17, 1929, (Tr. p. 208) and that he noticed that the purchase date of the automobile was different from the inception date

of the policy, so he placed marks around both dates to direct the attention of Mr. Haug to the fact that some investigation should be made. Mr. Haug testified that in making the investigation, at Mr. Arnberger's request, he called Leo Pockwitz Co. Inc. and was advised that the insurance had been overlooked (Tr. p. 163) and so he made that notation on the policy. (Tr. p. 163; Plaintiffs' Exhibit 2; Tr. p. 85.) Of course neither Dr. Carfagni nor his broker ever made any statement that insurance was overlooked, and they are not responsible for the conduct of Miss Hearney, who was employed by the general agent of the appellee company, in making such a statement to Mr. Haug. Neither Dr. Carfagni nor Mr. Payne was communicated with by Mr. Haug or any one else employed by the National Union Indemnity Co., and the version of Miss Hearney as to what was said upon the occasion of this application to the appellee for this first policy is in direct contradiction to the testimony of Mr. Payne and in violation of the custom and routine of the appellee's office. Moreover, the fact that Miss Hearney in her conversation with Mr. Haug on the subject of this insurance admittedly said nothing about the cancellation or refusal of prior insurance to Dr. Carfagni, should convince the court that Miss Hearney's testimony that Mr. Payne had told her the risk had not been cancelled previously by any other company, is entitled to small credence.

The account of Mr. Payne is further corroborated by Mr. Philip P. Sullivan, who was agency superintendent of the appellee insurance company at the

time, and who testified that it was not the custom of the agents or representatives of the appellee insurance company to ask anything about prior insurance or previous cancellations at the time they solicited or received applications for policies of public liability insurance. (Tr. p. 157.) The appellee's agents and representatives, in conformity with the custom of underwriters generally, only inquired concerning the name of the assured, the make and type of the automobile, the motor number, the effective date of the policy, and the coverage desired. (Tr. p. 157.) Mr. Sullivan further testified (Tr. p. 160) that when he was agency superintendent of the appellee corporation it was the custom of the agents of the appellee to insert the answer "No Exceptions" in answer to declaration No. 9, which concerns the subject of the cancellation of prior insurance, without making inquiry of the assured. (Tr. p. 161.) Mr. Sullivan further testified that while he was superintendent of the appellee corporation he always interpreted the answer "No Exceptions" in answer to the declaration No. 9 referring to prior cancellations, to mean that the appellee corporation lacked further information upon the subject. (Tr. pp. 160-161.) He further averred that he did not construe the answer "No Exceptions" in such a declaration, to be a warranty of the assured that no prior insurance had ever been cancelled or refused to him.

Dr. Carfagni paid a premium of $195.04 upon this first policy of public liability insurance which the appellee corporation issued to him on June 5, 1929. This policy ran one full year until its expiration

date on June 1, 1930. During that time the appellee paid no claims of Dr. Carfagni, although he had two slight collisions. (Tr. p. 102.)

On May 14, 1930 (Tr. p. 75), Dr. Carfagni again applied to the appellee corporation for a policy of public liability insurance upon the same Lincoln sedan automobile. He paid a premium of $197.94 to the appellee for this policy which was issued to him on June 1, 1930 (Plaintiffs' Exhibit 2), and which ran the full year until its expiration date on June 1, 1931. (Tr. p. 75.) According to Mr. Arnberger who was directly under Mr. Sullivan, the agency superintendent, it was the custom of the appellee to make an investigation of the record of an assured in the appellee's claims department, before renewing a policy for the assured. (Tr. p. 205.) Mr. Arnberger became local superintendent for the automobile department of the appellee early in 1930, and shortly after Mr. Sullivan left its employ. He instituted a rule that the underwriters should investigate every loss of an assured with the company before the appellee would renew a policy. The underwriter was required to obtain the claims reports to check (Tr. p. 206) the history of the assured with the appellee, and if the general experience of the assured with the appellee was such as to pronounce him a desirable risk, a renewal policy would be issued to him. The second policy which was issued by the appellee to Dr. Carfagni in June, 1930, was recommended by Mr. Grady who was employed in the claims department of the National Union Indemnity Company at the time. (Tr. p. 241.) The

notice upon the renewal order (Tr. p. 206) reads: "Renewal recommended by W. Grady 5-8-30". Mr. Grady testified (Tr. pp. 243, 244) that the renewal was recommended by him because he checked over the losses of the assured under the first policy issued to Dr. Carfagni by the appellee, and that upon a general consideration of the history of the assured with the National Union Indemnity Company, he recommended a renewal. At the time that Mr. Payne, the broker, applied to the National Union Indemnity Company in June, 1930, for this second policy of insurance, which was issued to Dr. Carfagni, no statement was made by Mr. Payne, Dr. Carfagni or by any one on behalf of Dr. Carfagni with respect to the cancellation or refusal of prior insurance. (Tr. p. 99.) The evidence *without contradiction* or dispute shows that the agents and representatives of the appellee company inserted the answer "No Exceptions" to declaration No. 9 in the policy issued to Dr. Carfagni in June of 1930, without at the time consulting Dr. Carfagni or his broker, Mr. Payne. The uncontradicted evidence further shows not only that Dr. Carfagni and Mr. Payne made no statement upon the subject of the cancellation or refusal of prior insurance, but further conclusively reveals that the subject of prior insurance or its cancellation or refusal was not even discussed upon the occasion of the application for, or issuance of, this second policy of insurance in June, 1930. This second policy of insurance ran the full year until its expiration on June 1, 1931. During that year, Dr. Carfagni made three

claims against the National Union Indemnity Company, and the appellee paid claims for him in the amounts of $41.75 and $95.23.

On May 15, 1931, application was made on behalf of Dr. Carfagni for a third policy of public liability insurance (Tr. p. 77), and on June 1, 1931, the appellee issued its third policy of public liability insurance to Dr. Carfagni upon the Lincoln sedan automobile. Dr. Carfagni paid a premium of $176.82 for this policy, which was to run until June 1, 1932. The uncontradicted evidence reveals (Tr. p. 99) that neither at the time this third policy was applied for or issued was any statement or representation made by Dr. Carfagni, or on his behalf, upon the subject of prior cancellations or refusals of insurance to him. *The evidence is uncontradicted that with respect to the policy of 1931, just as in the case of the policy of 1930, the agents of the appellee inserted the answer "No Exceptions" to declaration No. 9 without consulting Dr. Carfagni or his broker, Mr. Payne.*

On June 22, 1931, the accident occurred in which Mrs. Eddy was killed, as the result of the alleged negligence of Dr. Carfagni in the operation of his Lincoln sedan automobile. On June 30, 1931, approximately a week after the accident in which Mrs. Eddy was killed, the appellee company sent a purported notice of rescission (Tr. p. 175, Defendant's Exhibit J) to Dr. Carfagni, and denied liability upon the ground of the alleged false answer to declaration No. 9 of the third policy issued by the appellee to Dr. Carfagni in June, 1931.

The uncontradicted and undisputed evidence further reveals that in May, 1929, and at the time that each of the three policies were issued by the appellee to Dr. Carfagni in 1929, 1930, and 1931 respectively, there was in active existence an organization known as the Insurance Credit Clearance Association with its place of business in the Adam Grant Building in San Francisco. The appellee company was a member of this association along with other members including the Home Accident Insurance Company of Arkansas, and the Pacific Employers Insurance Company. The purpose of this association was to serve as a means of notifying its members of the cancellations or refusals of prior insurance to any persons who might apply to any of the members of the association for automobile public liability insurance. When any insurance was cancelled on, or refused to, any person who had been insured in any one of the member companies, a report was sent in immediately to Miss Signa Olsen by the member cancelling or refusing the insurance. (Tr. p. 233.) Miss Olsen was in active charge of the management of the Insurance Credit Clearance Association. These reports which were in code, included the name of the assured, his address, the name of the member company which had cancelled a policy of insurance on the assured, the amount of the coverage, the date of issuance of the policy and of its cancellation, the name of the broker, the reason for cancellation, and the number of the policy with the member company which had cancelled the insurance. When Miss Olsen received a report of cancellation from any member, she made copies

of the report and immediately distributed these copies containing all of the foregoing information, to the various members of the Insurance Credit Clearance Association. *The testimony of Miss Olsen, which is uncontradicted in the evidence, reveals that on August 13, 1928* (Tr. p. 234) *she delivered copies of Plaintiff's Exhibits 7 and 8 to all of the members of the Insurance Credit Clearance Association, including the appellee company.* The uncontradicted evidence further reveals, according to the testimony of Mr. Weaver, who had possession of the records of the association, Plaintiffs' Exhibits 7 and 8 when decoded (Tr. p. 227), notified the appellee company that the Home Accident Insurance Company (Member No. 6) because of a "bad credit report" (Code No. C) had cancelled, effective August 15, 1928, a policy of automobile public liability insurance which it had issued to Dr. Carfagni on July 27, 1928. The notice further specified the number of the policy and indicated that the policy had been placed through Mr. Payne (E. H. P.) the broker. The uncontradicted and undisputed evidence further shows that the National Union Indemnity Company had this notice in its files at all times from and after August 13, 1928 (Tr. p. 234), and at the time that it issued each of the three policies to Dr. Carfagni in 1929, 1930, and 1931, respectively. This notice of the Insurance Credit Clearance Association (Plaintiffs' Exhibits 7 and 8) was produced by the appellee at the trial upon the request of counsel for the appellants. (Tr. pp. 219, 220 and 227.) These notices which were delivered by Miss Olsen personally to the various members of the

association, were left by her at the automobile underwriting department of the National Union Indemnity Company. According to Mr. Arnberger who, until November 30, 1931, was employed by the appellee company and who had final authority from his employer to reject or refuse risks (Tr. pp. 214 and 201), these I. C. C. A. cards containing notices of prior cancellations of insurance, were kept in a cabinet in the underwriting department of the National Union Indemnity Company. (Tr. p. 212.) Mr. Arnberger, of course, admittedly knew of the I. C. C. A., of its function, of the practice of Miss Olsen in distributing daily notices of prior cancellations to the various members of the association, including the National Union Indemnity Company (Tr. p. 204), and was aware of the nature and character of the information distributed by the I. C. C. A.

Moreover on September 2, 1929, Miss Olsen (Tr. p. 234) also distributed copies of Plaintiffs' Exhibits 9 and 10 to the various members of the I. C. C. A., including the National Union Indemnity Company. This notice (Plaintiffs' Exhibits 9 and 10; Tr. pp. 232, 236) was retained in the files of the underwriting department of the appellee company at all times from and after September 2, 1929, and was produced by the appellee from its files at the trial upon request of counsel for the appellants. (Tr. pp. 236, 219, 220, 235.) This second notice, which was likewise in code, was also left by Miss Olsen in the course of her daily rounds to the various members, at the automobile underwriting department of the National Union Indemnity Company. Plaintiffs' Exhibits 9 and 10

when decoded reveal the following: That on October 5, 1928 (Tr. p. 232), the Pacific Employers Insurance Company (Member No. 10) had issued its full coverage policy of automobile public liability insurance No. 26,543 to Dr. Fred R. Carfagni of 580 Green Street, San Francisco; that the policy was placed through Mr. Payne as the broker (E. H. P.); that the policy was cancelled by the Pacific Employers Insurance Company as of June 11, 1929; that the reason for the cancellation was "bad experience". (Code No. B.)

Plaintiffs' Exhibits 9 and 10 were in the files of the National Union Indemnity Company at the times that it issued its second and third policies of insurance to Dr. Carfagni in June, 1930, and in June, 1931, respectively. According to Mr. Neal Weaver who was on the Executive Committee of the I. C. C. A., a member of the association wishing further particulars of the cancellation of prior insurance by any member of the association on an assured, or an applicant for insurance, could communicate with the association and receive a more detailed report. (Tr. p. 229.)

There was some slight confusion with respect to whether policy No. 26,543, which was issued to Dr. Carfagni on his Lincoln automobile on or about September 5, 1928, and which was cancelled on June 11, 1929, was the policy of the Washington Underwriters or the Pacific Employers Insurance Company. Mullin & Acton were the general agents of both of these companies, and although apparently the Pacific Employers Insurance Company was the company can-

celling the policy, the question of whether it was that company rather than the Washington Underwriters is immaterial, insofar as this case is concerned. In any event, we may say definitely that at all times from and after the 2nd day of September, 1929, the National Union Indemnity Company also had in its possession a notice of the I. C. C. A. showing that prior thereto the Pacific Employers Insurance Company (Tr. pp. 232, 236) or the Washington Underwriters had cancelled an automobile public liability policy bearing the number 26,543 (Tr. pp. 236, 237) and which normally would have expired on September 5, 1929. This policy, which was cancelled, covered the same Lincoln sedan automobile, which was later covered by the policies taken out by Dr. Carfagni in the National Union Indemnity Company.

According to Mr. Arnberger these notices of the I. C. C. A. (Tr. p. 204) of cancellations of prior insurance to Dr. Carfagni, were filed in a cabinet in or under the counter of the underwriting department of the National Union Indemnity Company. (Tr. p. 204.)

When Mr. Arnberger became Superintendent of the National Union Indemnity Company as successor to Mr. Philip Sullivan, he inaugurated the rule that the I. C. C. A. cards should be filed with, or interwoven with, the claims reports of the various persons holding policies of automobile public liability insurance in the National Union Indemnity Company. This system of "interweaving" (Tr. p. 223) the I. C. C. A. notices with the claims records of the various persons insured by the appellee, was started in January of

1930 and possibly was completed in May, 1930, more than a year before the issuance of the policy sued upon herein. Thus, according to Mr. Arnberger, if in July, 1930, an application for public liability insurance had been made on behalf of Dr. Carfagni (Tr. p. 216), an investigation would be made as to his record with the appellee company upon the information in its possession. A clerk would obtain his file, including the I. C. C. A. cards giving notice of prior cancellations and would deliver it to Mr. Arnberger. (Tr. p. 216.) Upon considering all of the information at hand, including that obtained from the I. C. C. A. cards as to prior cancellations (Tr. p. 219) Mr. Arnberger would decide whether to issue a policy to Dr. Carfagni, or to reject the risk. Any failure of the National Union Indemnity Company to investigate the record of Dr. Carfagni with the appellee company, and to consult the I. C. C. A. cards in its possession upon the application by Dr. Carfagni for a renewal of his insurance, was explained by Mr. Arnberger in these words (Tr. p. 216): "Possibly we should have done that, but business was coming in fast at that time." We deem it particularly significant that at the time it issued the policy sued upon herein to Dr. Carfagni in 1931, the appellee company had in its files notices of the cancellation of the only two policies which the evidence in the instant case reveals were cancelled prior to the issuance of the policy sued upon herein.

Although the National Union Indemnity Company had in its possession the notices of prior cancellations of insurance to Dr. Carfagni (Plaintiffs' Exhibits

7, 8, 9 and 10) on June 1, 1931, the date upon which the policy sued upon herein was issued, it professed to have been ignorant at that time of prior cancellations on Dr. Carfagni. The appellee company had no difficulty in obtaining, however, within one week after the date of the accident in which Mrs. Eddy was killed, a complete record of the prior cancellations of insurance on Dr. Carfagni. Mr. Jacobus, who in June, 1931, was Superintendent of Claims for the appellee company, immediately after the accident of June 22, 1931, looked up the records of Dr. Carfagni in the I. C. C. A. and from the files of the appellee company, and thereupon on June 30, 1931, notified Dr. Carfagni that his policy was cancelled. (Tr. p. 175, Defendant's Exhibit J.)

In addition to the other circumstances hereinbefore revealed in the evidence, and by way of conclusion we wish to call the attention of this court to the following facts which are *undisputed* and *unchallenged* in the evidence:

1. That the policy sued upon herein was the third policy issued by the appellee company to Dr. Carfagni, the first two policies having each run one year to completion;

2. That at the time the appellee company issued its first policy to Dr. Carfagni in June, 1929, and at the time it issued its two subsequent policies to him it had in its possession Plaintiffs' Exhibits 7 and 8, being notices that on August 15, 1928, the Home Accident Insurance Company had cancelled a policy of automobile public liability insurance theretofore issued to Dr. Carfagni.

3. That at the time the appellee issued its last two policies of automobile public liability insurance to Dr. Carfagni in 1930 and 1931 respectively, it also had in its possession Plaintiffs' Exhibits 9 and 10, being notices from the I. C. C. A. showing that on August 15, 1928, the Pacific Employers Insurance Company (or the Washington Underwriters, another company for which Mullin & Acton were general agents) had cancelled a policy of automobile public liability insurance theretofore issued to Dr. Carfagni, as a "bad risk".

4. That the answer "No Exceptions" in declaration No. 9 in the policy issued by the appellee to Dr. Carfagni in June, 1930, and in the policy sued upon herein and issued to him in June, 1931, were inserted by representatives of the appellee company without having at the time any discussion whatever with, or inquiry of, either Dr. Carfagni or Mr. Payne, his broker, upon the subject of the cancellation or refusal of prior insurance.

5. That Judge Kerrigan, before whom this case was tried, found (Tr. pp. 21, 22) and in his opinion (Tr. p. 16) declared that the *appellee company* had knowledge of the cancellation of the two prior policies by other insurance companies, at the time application was made for the policy sued upon herein.

6. That, although the appellee insurance company had knowledge of the cancellation of prior policies, nevertheless, after the occurrence of the accident, in which Mrs. Eddy was killed, it sent Dr. Carfagni's Lincoln sedan automobile to Larkin & Co., an automobile repair shop, for the purpose of having it

restored to good condition. (Tr. p. 105.) Upon the completion of the work, however, the appellee insurance company refused to pay the bill for the repairs which it had ordered, so that Dr. Carfagni had to bear the expense.

Upon a consideration of the evidence generally, particularly with respect to the undisputed facts of the case, we submit that the legal principles, in support of which we present the following authorities, compel a reversal of the judgment of the trial court.

II.

STATEMENT OF THE ISSUES INVOLVED.

The following is a brief summary of the issues involved in the present appeal:

1. Whether, as the appellants contend, the evidence is insufficient to establish that Dr. Carfagni or his agent committed a breach of warranty in connection with the issuance of the policy of insurance sued upon herein.

2. Whether, as the appellants contend, the conduct of the agent of the appellee in inserting the erroneous response to declaration No. 9 in the policy, without at the time consulting Dr. Carfagni or his agent, constituted an estoppel of the appellee from setting up the alleged breach of warranty in avoidance of liability on the policy.

3. Whether, as the appellants contend, the conduct of the agent of the appellee, in inserting the erroneous response to declaration No. 9 in the policy, without at

the time consulting Dr. Carfagni or his agent, operated as a waiver by the appellee of any right to set up an alleged breach of warranty in avoidance of liability on the policy.

4. Whether, as the appellants contend, the conduct of the appellee in issuing the policy involved, with knowledge of prior cancellations on Dr. Carfagni, constituted an estoppel of the appellee from setting up the alleged breach of warranty in avoidance of liability on the policy.

5. Whether, as the appellants contend, the conduct of the appellee in issuing the policy involved, with knowledge of prior cancellations on Dr. Carfagni, operated as a waiver by the appellee of any right to avoid liability on the policy upon the grounds of the alleged breach of warranty.

6. Whether section 633d of the California Political Code vested the local agents of the appellee with such authority that, irrespective of the provisions of the policy, they had authority to waive or modify any of the written provisions of the policy.

7. Whether the cancellation of a prior policy, because the assured was "a bad credit risk" was for a material reason, so as to require it to be mentioned in answer to declaration No. 9 in the policy herein.

8. Whether the conduct of the appellee company, in performing acts consistent with recognizing the policy as being still effective, after knowledge of facts giving it the alleged right to rescind, operated as a waiver or estoppel of any right which it theretofore had to cancel the policy involved herein.

9. Whether the trial court erred in finding that any insurance company, other than the Home Accident Insurance Company and the Pacific Employers Insurance Company, cancelled insurance on Dr. Carfagni within three years prior to the issuance of the policy herein involved.

III.

SPECIFICATION OF ERRORS RELIED UPON.

The following is a list of specification of errors relied upon in this appeal.

1.

That the evidence adduced on the trial of said action was and is insufficient to justify or support the decision of the court and the judgment thereon in favor of defendant and against plaintiffs.

2.

That the evidence was and is insufficient to justify or support the decision of the court and the judgment thereon for the reason that the uncontradicted evidence showed and shows that on or about June 5, 1929, and at the time that defendant issued to Fred R. Carfagni its first automobile insurance policy for the term from June 1, 1929, to June 1, 1930, and also on or about May 9, 1930, and at the time that said defendant issued to said Fred R. Carfagni its renewal of said insurance policy for the term beginning June 1, 1930, and ending June 1, 1931, and also on or about May 13, 1931, and at the time that said defendant issued to said Fred R. Carfagni its renewal of said

insurance policy for the term from June 1, 1931, to June 1, 1932, said defendant knew, in connection with the issuance of each and all of said three policies of insurance to said Fred R. Carfagni, that other automobile insurance had previously and within three years prior to the date of the issuance of each of said policies been cancelled on said Fred R. Carfagni, and defendant at the time it issued each of said policies to Fred R. Carfagni had full knowledge of all of the matters constituting the alleged breaches of warranty set forth in its answer and upon which it relied for the avoidance of all obligations under the third annual policy issued by it to Fred R. Carfagni on or about May 13, 1931.

3.

That the evidence was and is insufficient to justify or support the decision of the court and the judgment thereon for the reason that the uncontradicted evidence showed and shows that during the period from June 1, 1929, to June 30, 1931, said defendant issued three successive automobile insurance policies for the term of one year each, to Fred R. Carfagni on the Lincoln automobile referred to in plaintiffs' complaint; that during said period of time said Fred R. Carfagni had no insurance on said or any other automobile other than that which was issued by said defendant; that all automobile insurance cancelled on said Fred R. Carfagni was issued prior to June 1, 1929, and was cancelled prior to said date; that said defendant had knowledge of the cancellation of said automobile insurance at the time it issued to Fred R.

Carfagni its automobile insurance policy for the term beginning June 1, 1929, and also at the time that it issued its renewal policy for the year beginning June 1, 1930, and also at the time that it issued its second renewal policy for the year beginning June 1, 1931; that said Fred R. Carfagni had losses under the policy issued to him by said defendant for the year beginning June 1, 1929, and also had losses under the policy issued to him by said defendant for the year beginning June 1, 1930, and said losses were paid by said defendant prior to May 13, 1931 (the date of the issuance of its third policy to Fred R. Carfagni), with the knowledge of said defendant that said automobile insurance had previously been cancelled on said Fred R. Carfagni, and without any objection whatever upon the part of said defendant, and without said defendant claiming or attempting to claim that said policies issued by it to Fred R. Carfagni, or any of them, were void or voidable because of any alleged false or untrue statement made by said Fred R. Carfagni concerning the cancellation of automobile insurance previously issued to him, or because of any alleged breach of warranty made by said Fred R. Carfagni to the effect that no company had previously cancelled any automobile insurance on him during the period of three years preceding the issuance of each of said policies.

4.

That the court erred in finding and holding that statement numbered 9 in the schedule of declarations of the policy of insurance issued by defendant to

Fred R. Carfagni under date of May 13, 1931, reading:

> "9. No company has cancelled or refused to issue any kind of automobile insurance for the assured during the past three years, except as follows: No exceptions."

was untrue, and further erred in finding and holding that said statement number 9 was a material warranty, for the reason that the evidence showed and shows that no such statement or declaration was made or given by said Fred R. Carfagni, and further showed and shows that if said statement or declaration was made or given by him, and/or that the same was untrue, that said defendant knew that it was untrue at the time that the policy was issued and by reason thereof waived the same, and is estopped from avoiding or attempting to avoid said policy and the obligations thereunder because of the alleged untruth of said statement numbered 9 in said schedule of declarations.

5.

That the court erred in holding and finding that said statement numbered 9 in said schedule of declarations was a material warranty or a warranty at all, for the reason that the evidence showed and shows that no such statement, declaration or warranty was made or given by said Fred R. Carfagni, and that said defendant knew at the time that said policy was issued and delivered by it of all automobile insurance previously cancelled on said Fred R. Carfagni, and with knowledge of such cancellations itself filled in the

answer "no exceptions" to said statement numbered 9.

6.

That the court erred in finding and holding that said alleged material warranty in said statement numbered 9 was breached in that the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas, within the period of three years preceding the issuance and delivery of the said policy of May 13, 1931, cancelled as a bad risk, on or about August 11, 1928, an automobile insurance policy it had previously issued and delivered to said Fred R. Carfagni on June 27, 1928; that said court erred in so finding and holding for the reason that the evidence showed and shows that said defendant at the time that it issued said policy of May 13, 1931, to Fred R. Carfagni knew and at all times from and after August 13, 1928, knew of said date of the issuance and said date of cancellation of said automobile insurance policy by said Home Accident and said Home Fire Insurance Company of Little Rock, Arkansas, to said Fred R. Carfagni, and also knew that said policy had been cancelled because of a bad credit report concerning said Fred R. Carfagni, and not because said Fred R. Carfagni was a bad risk.

7.

That the court erred in finding and holding that said alleged material warranty in statement number 9 was breached in that the Travelers Insurance Company cancelled on September 15, 1928, an automobile

insurance policy it had previously issued to Fred R. Carfagni; that the court so erred for the reason that said finding and holding was entirely outside the issues of said action as made by the pleadings and tried by the court, and for the further reason that the evidence did not show or tend to show that said Travelers Insurance Company policy was cancelled, but on the contrary showed and shows without contradiction that said policy was not cancelled.

8.

That the court erred in finding and holding that said alleged material warranty in statement numbered 9 was breached in that the Washington Underwriters Company on or about October 5, 1928, cancelled a policy of automobile insurance previously issued by it to Fred R. Carfagni on or about September 5, 1928; that the court so erred for the reason that said finding and holding was entirely outside the issues as made by the pleadings and tried by the court, and for the further reason that the evidence did not show or tend to show that said Washington Underwriters Company policy was cancelled, but on the contrary showed and shows without contradiction that said policy was not cancelled.

9.

The court erred in finding and holding that said alleged material warranty in statement numbered 9 was breached in that Western States Insurance Company on or about June 1, 1929, cancelled a policy of automobile insurance it had previously issued to Fred

R. Carfagni; that the court so erred for the reason that said finding and holding was outside the issues as made by the pleadings and tried by the court and for the further reason that the evidence did not show or tend to show that said Western States Insurance Company policy was cancelled, but on the contrary showed and shows without contradiction that said policy was not cancelled; and said court erred in so finding and holding for the further reason that the evidence showed that if said Western States Insurance Policy to Fred R. Carfagni was cancelled, it was cancelled on June 11, 1929, and said defendant had knowledge of the cancellation thereof, and of the reason for such cancellation from and after September 2, 1929, and at the time that it issued its first renewal policy to Fred R. Carfagni on May 9, 1930, and at the time that it issued its second renewal policy to said Fred R. Carfagni on May 13, 1931.

10.

The court erred in finding and holding that on or about June 1, 1929, Fred R. Carfagni by and through his agent falsely represented to defendant that there had been no losses or cancellations by any other company, and that it was in order for said company to write up said policy of automobile insurance for the reason that there was and is no evidence sufficient to justify or support said finding, or any part thereof; and for the further reason that if the evidence showed or shows that said representation and statement was made, the evidence further showed without conflict that the statement was not false or untrue; and for the further reason that if the evidence showed that said

statement and representation was made and that the same was false and untrue, the evidence further showed that the statement was not relied or acted upon by said defendant at the time that it issued the original policy of June 1, 1929, or either of the subsequent two policies, as defendant knew at all of said times of the policies of automobile insurance previously issued to said Fred R. Carfagni which had been cancelled within three years prior to the date of each of defendant's policies to said Fred R. Carfagni, and also knew of the reasons for such cancellations.

11.

That the court erred in finding and holding that the automobile insurance policy of defendant issued and delivered to Fred R. Carfagni on or about May 13, 1931, was renewed and based upon the information and statements contained in the first automobile insurance policy issued and delivered by the defendant to Fred R. Carfagni on or about June 1, 1929, for the reason that the evidence was and is insufficient to support or justify said finding; and for the further reason that the evidence showed and shows that at the time that said policy of May 13, 1931, was issued and delivered to Fred R. Carfagni said defendant knew that the answer "No exceptions" to statement numbered 9 in the schedule of declarations in said first policy issued by it to Fred R. Carfagni was not correct in that automobile insurance issued to Fred R. Carfagni had been cancelled within three years prior to the date of the issuance and delivery of said policy; and for the further reason that immediately prior to May 13, 1931, said defendant had approximately

two years experience with Fred R. Carfagni as an assured under automobile insurance policies, and said defendant issued its said policy of May 13, 1931, based entirely upon its own experience with said Fred R. Carfagni and without considering at all the answer "No exceptions" to said statement numbered 9 in the schedule of declarations contained in its original policy to Fred R. Carfagni.

12.

The court erred in holding and finding that defendant had knowledge of the cancellation of a policy of Pacific Employers Insurance Company to Fred R. Carfagni within three years prior to May 13, 1931, for the reason that there was and is no evidence whatever to justify or support said finding.

13.

The court erred in finding and holding that defendant did not have any knowledge concerning the details, or the particular reasons which caused said automobile insurance companies to cancel out the policies of said Fred R. Carfagni for the reason that there was and is no evidence sufficient to justify or support said finding or any part thereof; and for the further reason that the evidence showed and shows without contradiction that defendant knew the particular reasons for the cancellation of any and all automobile insurance policies issued to said Fred R. Carfagni prior to May 13, 1931, and cancelled by the companies issuing the same.

14.

The court erred in finding and holding as follows:

> "The court further finds that the defendant did not have any knowledge at the time it issued and delivered its policy of automobile insurance of May 13, 1931, to Fred R. Carfagni concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Travelers Insurance Company on or about September 15, 1928; that the defendant did not have any knowledge concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Washington Underwriters Company on or about October 5, 1928; that the defendant did not have any knowledge concerning the cancellation of Fred R. Carfagni's automobile insurance policy by the Western States Insurance Company on or about June 1, 1929; that the aforesaid cancellations made by the Travelers Insurance Company, Washington Underwriters Company, and Western States Insurance Company without the knowledge of the defendant were all made within said three year period prior to May 13, 1931."

for the reason that the evidence was and is insufficient to justify or support said findings or any part thereof; and for the further reason that said findings and the whole thereof were outside the issues as made by the pleadings and tried by the court; and for the further reason that there was no evidence showing or tending to show that any of said policies issued to Fred R. Carfagni by Travelers Insurance Company, Washington Underwriters Company, and Western States Insurance Company was cancelled within, or under the terms of said policies, or otherwise, or at all; and

for the further reason that the uncontradicted evidence showed and shows that if said policy issued by the Western States Insurance Company to Fred R. Carfagni was cancelled on or about June 1, 1929, said defendant had notice and knowledge of the cancellation thereof, and the reason for such cancellation from and after September 2, 1929, and at the time that it issued its first renewal policy to said Fred R. Carfagni on May 8, 1930, and at the time that it issued its second renewal policy on May 13, 1931.

15.

The court erred in finding and holding that no provision or condition of said automobile public liability insurance policy No. 627,670 issued by defendant to Fred R. Carfagni on or about May 13, 1931, was ever waived or altered for the reason that there was and is no evidence to justify or support said finding; and for the further reason that the evidence showed and shows that said defendant at the time that it issued said policy and also at the times that it issued its previous policies of June 5, 1929, and May 8, 1930, to said Fred R. Carfagni, knew that automobile insurance had been cancelled on said Fred R. Carfagni within three years prior to the issuance of each of said policies, and the reasons for such cancellations; and also knew that the answer "No exceptions" to said statement numbered 9 in the schedule of declarations of each of said policies was and would be incorrect for said reason, and yet inserted said answer "No exceptions" in answer to said statement numbered 9 in each of said policies and issued said policies with

said answer "No exceptions" therein, thereby waiving the entire subject matter of said statement number 9 in said schedule of declarations of each of said policies; and for the further reason that said defendant waived the subject matter of said statement numbered 9 and agreed to issue and did issue each of its said three policies to said Fred R. Carfagni even though said Fred R. Carfagni had automobile insurance cancelled on all within three years prior to the date of each of said policies.

16.

The court erred in finding and concluding that defendant did not waive the requirements of the following provision of the policy of automobile insurance issued by it to Fred R. Carfagni on May 13, 1931, to wit:

> "1. Waiver. No provision or condition of this policy shall be waived or altered, except by written endorsement attached hereto and signed by the president or secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the company unless such person, firm or corporation is authorized in writing as such agent by the president or secretary."

for the reason that there was and is no evidence to justify or support said finding; and for the further reason that the evidence showed and shows that the said provision of said policy and the requirements of said provision were waived by said defendant.

17.

The court erred in finding and holding as follows:

> "The court further finds that by reason of said false warranty contained in said statement numbered 9 of said schedule of declarations and by reason of the breach of said material warranty, the said policy of automobile insurance No. 627,-670 became and was void from its date of issuance and said policy never attached to any of the risks therein mentioned."

for the reason that there was and is no evidence sufficient to justify or support said finding that any false warranty was contained in said statement numbered 9, or that there was any breach of said or any material warranty; and for the further reason that the evidence showed and shows that said policy was at all times in full force and effect from the date of its issuance on May 13, 1931, until some time after June 22, 1931, and that said policy attached to all of the risks therein mentioned, including the risk connected with the automobile accident which Fred R. Carfagni had on June 22, 1931, as a result of which accident Mary Elizabeth Eddy died.

18.

The court erred in finding and holding that the defendant did not accept or assume at any time any liability under said automobile insurance policy issued and delivered to said Fred R. Carfagni on or about May 13, 1931, for the reason that the evidence was and is insufficient to justify or support said finding; and for the further reason that the evidence showed

and shows without contradiction that immediately following said automobile accident on June 22, 1931, as a result of which said Mary Elizabeth Eddy died, said defendant directed said Fred R. Carfagni to have his automobile repaired at an automobile repair shop selected and designated by said defendant, and said automobile was repaired at said shop because of said direction from said defendant; and for the further reason that the evidence showed and shows that said defendant accepted and assumed all liability under said automobile insurance policy issued and delivered to said Fred R. Carfagni on or about May 13, 1931, continuously thereafter until June 30, 1931, and said defendant considered and treated said policy as in full force and effect during all said period, even though said defendant knew at the time that the policy was issued on May 13, 1931, and for more than two years prior to said date that the answer "No exceptions" to statement numbered 9 of the schedule of declarations in said policy was not correct, because Fred R. Carfagni had insurance policies cancelled on him within three years prior to May 13, 1931.

19.

That the court erred in concluding that plaintiffs should take nothing by their complaint and that defendants were and are entitled to judgment against plaintiffs for the reason that the evidence was and is insufficient to justify or support a judgment in favor of said defendant or any judgment other than one in favor of said plaintiffs.

20.

The court erred in finding and concluding that defendant did not waive the alleged breaches of warranty referred to in defendant's answer for the reason that the evidence was and is insufficient to justify or support said finding, and for the reason that the uncontradicted evidence shows that said defendant did waive each and all alleged breaches of warranty.

21.

That the court erred in finding and holding that defendant was not estopped from avoiding liability to plaintiffs on the insurance policy referred to in plaintiff's complaint on the ground of the alleged breaches of warranty referred to in defendant's answer for the reason that the evidence was and is insufficient to justify or support said finding, and for the further reason that the uncontradicted evidence shows that defendant was and is estopped from avoiding or attempting to avoid liability on said policy on the ground of said alleged breaches of warranty as said defendant had full knowledge of said alleged breaches of warranty at the time that it issued said policy to Fred R. Carfagni.

22.

That the court erred in finding and concluding that defendant in attempting to avoid liability on the insurance policy referred to in plaintiff's complaint was not estopped from relying upon or proving failure to comply with the provisions of said insurance policy set forth in assignment XIV hereinbefore for the

reason that the evidence was and is insufficient to support or justify said finding, and for the further reason that the uncontradicted evidence shows that said defendant was and should be estopped from relying upon or proving failure to comply with said provision of said policy.

23.

That the court erred in rejecting the following amendments proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to wit:

> "Concerning said statement numbered 9 in said schedule of declarations, the court finds that the Home Accident and Home Fire Insurance Company of Little Rock Arkansas on July 27, 1928, issued a policy of automobile insurance to Fred R. Carfagni, which said policy of insurance was cancelled by it on August 14, 1928, because of a bad credit report which it had then and there received and obtained concerning said Fred R. Carfagni; and the court further finds that Washington Underwriters Company (of which Western States Insurance Company was general agent) issued an automobile insurance policy to said Fred R. Carfagni on October 5, 1928, the date upon which he became the owner of said Lincoln sedan automobile, and that said policy remained in effect until June 1, 1929, on which date the first policy of automobile public liability insurance issued by said defendant to said Fred R. Carfagni went into effect, as hereinafter stated. Prior to said 1st day of June, 1929, said Washington Underwriters Company requested the insurance broker for said Fred R. Carfagni

to place the insurance of said Fred R. Carfagni in another company, and because of said request, said policy of June 1, 1929, was obtained from and issued by defendant, and thereafter and on June 11, 1929, said Washington Underwriters Company cancelled its said policy of October 5, 1928, upon its books without giving any notice of cancellation to said Fred R. Carfagni or to any one on his behalf.

The court further finds that it is not true that Fred R. Carfagni or any one acting for him, in procuring or accepting the policy of insurance issued to him on May 13, 1931, represented or warranted to defendant that no company had cancelled or refused any kind of automobile insurance theretofore issued to him. In this behalf the court finds that said policy of insurance issued by said defendant to said Fred R. Carfagni on May 13, 1931, was so issued without any written application having been made or signed by Fred R. Carfagni or any one on his behalf, and said policy of insurance with said statement numbered 9 in said schedule of declarations filled in, as aforesaid, was issued and delivered to said Fred R. Carfagni without said statement having been made or answered by him or any one for him and without the question of whether or not any company had theretofore cancelled or refused to issue automobile insurance to him being at all mentioned or discussed, and without either said Fred R. Carfagni or any one acting for him knowing, until after June 22, 1931, that said policy contained or purported to contain any statement or answer upon that subject."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

24.

That the court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to-wit:

> "The court further finds that said automobile insurance policy issued and delivered by defendant to Fred R. Carfagni on or about May 13, 1931, was for the policy period from June 1, 1931, to June 1, 1932, and was a renewal of a policy issued and delivered to him by said defendant on or about June 1, 1930, for the policy period from June 1, 1930, to June 1, 1931; and the court further finds that said policy issued by said defendant to said Fred R. Carfagni on or about June 1, 1930, was a renewal of a policy issued and delivered to him by said defendant on or about June 1, 1929, for the policy period from June 1, 1929, to June 1, 1930; the court further finds that each of said policies issued by defendant to said Fred R. Carfagni on June 1, 1929, and on June 1, 1930, was so issued without any written application having been made or signed by Fred R. Carfagni or any one on his behalf, and said policy of insurance, with said statement numbered 9 in the schedule of declarations filled in, as aforesaid, was issued and delivered to said Fred R. Carfagni without said statement having been made by him or by any one for him, and without the question of whether or not any company had theretofore cancelled or refused to issue any kind of automobile insurance to him being at all mentioned or discussed, and without either said Fred

R. Carfagni or any one acting for him knowing, until after June 22, 1931, that said policy contained or purported to contain any statement or answer upon that subject."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

25.

That the court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to-wit:

"The court further finds that it is true that at the time defendant issued and delivered its policy of insurance on or about May 13, 1931, and also at the time that it issued its prior policies of automobile insurance on or about June 1, 1929, and on or about June 1, 1930, to Fred R. Carfagni, as aforesaid, it had knowledge of the cancellation on or about August 15, 1928, of the policy issued to said Fred R. Carfagni by the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas on or about July 27, 1928, hereinabove referred to; and it is true that defendant, at the time that it issued said policies to said Fred R. Carfagni on or about June 1, 1930, and on or about May 13, 1931, had knowledge of said policy of automobile insurance issued by Washington Underwriters Company to said Fred R. Carfagni on or about October 5, 1928, and knew that said last mentioned policy had terminated on June 1, 1929, as aforesaid, and also knew that said policy had been cancelled upon the books of said Washington Underwriters Company on or about June 11, 1929, having theretofore been noti-

fied by said Washington Underwriters Company that it had cancelled said policy because of its bad experience with said Fred R. Carfagni.

The court further finds that at the time defendant issued each of said three policies to said Fred R. Carfagni, as aforesaid, containing said statement numbered 9 in the schedule of declarations, said defendant knew that said statement contained in each of said policies was not true, and none of said policies was issued in reliance upon or in consideration of the truth or correctness of said statement numbered 9."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

26.

That the court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to-wit:

"The court further finds that statement numbered 9 in the schedule of declarations of said automobile public liability insurance policy No. 627670, issued by said defendant on or about May 13, 1931, was not waived or altered in writing or by written endorsement attached to said policy signed by the president or secretary of said defendant, although at the time that said policy was issued by it, said defendant knew that said statement was not true, as hereinabove found by this court.

* * * * * * *

The court further finds that on or about said 30th day of June, 1931, defendant tendered and offered to said Fred R. Carfagni the principal

amount of the premium paid on or about May 13, 1931, upon said policy; to-wit, $176.82, but that said defendant has never tendered or offered to pay to said Fred R. Carfagni any interest upon said sum."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

27.

That the court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to-wit:

"The court further finds that during the period that said policy issued by said defendant to Fred R. Carfagni on or about June 1, 1929, was in force and effect, said defendant without objection paid claims made against it under said policy, and that during the period that said policy issued by said defendant to said Fred R. Carfagni on or about June 1, 1930, was in force and effect, said defendant voluntarily paid claims made against it under said policy; and the court further finds that said Lincoln sedan automobile of said Fred R. Carfagni was damaged on June 22, 1931, as the result of the collision in which said Mary Elizabeth Eddy was injured and died, and on or about June 23, 1931, said defendant designated the automobile repair shop at which said Fred R. Carfagni should have his said automobile repaired, at the expense of said defendant, and said Fred R. Carfagni accordingly had said automobile repaired at said shop, but when the said work upon said automobile was completed, said defendant refused to pay for the same."

for the reason that each and every part of said finding was in exact accord with the uncontradicted evidence.

28.

The court erred in rejecting the following amendment proposed by plaintiffs to defendant's proposed findings of fact and conclusions of law, to-wit:

> "The court finds that it is true that Fred R. Carfagni was the owner of a certain Lincoln automobile from October 5, 1928 to June 22, 1931 and thereafter; that on June 22, 1931, said Fred R. Carfagni, while operating said automobile, caused it to collide with an automobile in which Mary Elizabeth Eddy was riding, and as a result thereof, said Mary Elizabeth Eddy suffered injuries, from which she died; and that thereafter Albert Z. Eddy, Albert P. Eddy, Raymond E. Eddy and Gladys Kane, as the only heirs at law surviving Mary Elizabeth Eddy, prosecuted an action against said Fred R. Carfagni in the Superior Court of the City and County of San Francisco to recover damages for the death of said Mary Elizabeth Eddy, caused as aforesaid, and the trial of said action resulted in a judgment on the 2nd day of June, 1932, in favor of said heirs of said Mary Elizabeth Eddy and against Fred R. Carfagni in the sum of $15,900, together with costs in the sum of $147.90, which said judgment had become final, and execution thereon had been duly issued and returned by the sheriff of the City and County of San Francisco wholly unsatisfied, prior to the commencement of the above entitled action.

The court finds that it is true that on or about May 13, 1931, the defendant insurance company, a corporation, of Pittsburgh, Pennsylvania, doing business in California, issued and delivered to Fred R. Carfagni its certain policy of automobile public liability insurance No. 627670, wherein and whereby said defendant agreed to insure said Fred R. Carfagni against loss and all expenses resulting from claims upon the assured from damages on account of bodily injuries, including death, resulting from the ownership and/or operation of said Lincoln sedan automobile; that the term of said policy of insurance was from June 1, 1931 to June 1, 1932; that said policy provided that defendant's limit of liability on account of one person injured or killed would be $15,000 together with court costs and interest on a judgment, and that said policy further provided that said defendant was and is bound to the extent of its liability under said policy to pay and satisfy and protect said Fred R. Carfagni against the levy of execution upon, any final judgment that may be recovered upon any claim covered by said policy as in the policy set forth and limited, and that an action may be maintained upon such judgment by the injured person or persons or such other party or parties in whom the right of action vests to enforce such liability of defendant, as in the policy set forth and limited."

29.

That the evidence was and is insufficient to justify or support the decision of the court and the judgment thereon, for the reason that the uncontradicted evi-

dence showed and shows that at all times from and after August 13, 1928, defendant knew that within three years prior to the 5th day of June, 1929, and/or within three years prior to the 13th day of May, 1931, automobile insurance theretofore issued to Fred R. Carfagni had been cancelled or refused to him; that defendant well knew that Fred R. Carfagni at all times from and after June 5, 1929, believed and considered that he was insured with defendant, and acting under such belief, thereafter duly paid insurance premiums to defendant; that defendant, although knowing of said belief of said Fred R. Carfagni, accepted said premiums from him; and that defendant well knew Fred R. Carfagni would not have paid any of said premiums, had he known or believed that defendant would seek to avoid liability upon its policies of insurance to him or any thereof, by reason of the facts alleged in defendant's answer.

30.

That the court erred in overruling the objection of plaintiffs to the introduction in evidence of Defendant's Exhibit B, which objection was as follows:

> "Mr. Barry. I urge the objection that they are immaterial, irrelevant and incompetent; that if they are for the purpose of showing cancellation, may it please your Honor, they do not show it; if they are for any other purpose, they are entirely immaterial, because this case is not being tried upon so-called confidential reports received by the Home Accident Company, and the only

pertinency of the whole matter is whether the Home Accident Company did cancel the policy of insurance at or about the time already mentioned.

The Court. Overruled; exception.

Mr. Barry. Has your Honor seen these statements, as far as the subject-matter of them is concerned?

The Court. No, but I will admit them."

31.

The court erred in overruling the objection of plaintiffs to the following testimony elicited from witness Richard Arnberger; viz.:

"Q. Now, I will ask you, Mr. Arnberger, whether at any time in 1930 or 1931, under your invariable practice, you had placed upon your desk any index cards of Dr. Fred R. Carfagni with any I. C. C. A. cards?

Mr. Barry. The question is objected to on the ground that it is immaterial. It is not a question of what was placed on his desk. It is a question of whether there was information at the National Union.

The Court. Yes; nevertheless, I will overrule the objection. Exception.

A. I have no recollection of ever having received the index card and I. C. C. A. card on Dr. Fred R. Carfagni."

32.

That the court erred in denying plaintiffs' motion made at the close of the evidence, and before the cause was argued or submitted for decision, for judg-

ment in favor of plaintiffs, upon the ground that the evidence was and is insufficient to justify or support a judgment for defendant or any judgment other than one in favor of plaintiffs.

33.

That the court erred in concluding and deciding as follows:

> "If this case were being tried in the California State Court, I should be bound to hold that issuance of a policy with the knowledge of prior cancellations, constituted a waiver of declaration No. 9 in the policy, and that plaintiffs should recover. Since, however, this is a case in the Federal Court, I am bound by the law as declared by the United States Supreme Court that such warranty can only be waived by a writing executed by the proper officers of the insurance company. There is no such writing introduced in evidence in this case, plaintiffs are not entitled to recover."

34.

That the court erred in giving and making its judgment in favor of defendant and against plaintiffs, for the reason that the special findings made by the court do not justify or support said judgment and will not justify or support any judgment, other than one in favor of plaintiffs.

IV.

IT IS WELL SETTLED THAT CONTRACTS OF INSURANCE SHOULD BE CONSTRUED LIBERALLY AS AGAINST THE INSURED AND STRICTLY AS AGAINST THE INSURER.

This rule is so well established that a general reference to some of the leading decisions from our federal courts upon the subject should suffice.

Woodside v. Canton Insurance Office, 84 Fed. 283;

Pacific Coast Casualty Co. v. General Bonding & Casualty Co., 240 Fed. 36;

Aetna Insurance Co. v. Sacramento-Stockton Co., 273 Fed. 55;

Aetna Casualty & Surety Co. v. Independent Bridge Co., 55 Fed. (2d) 79; certiorari denied, 286 U. S. 548, 76 L. Ed. 1284;

Atlantic Life Insurance Co. v. Pharr, 59 Fed. (2d) 1024;

Wharton v. Aetna Life Insurance Co., 48 Fed. (2d) 37; certiorari denied, 284 U. S. 621, 76 L. Ed. 529.

V.

IN ORDER THAT AN INSURANCE COMPANY MAY AVOID LIABILITY UPON A POLICY, IT MUST ESTABLISH THE FRAUD OR OTHER GROUNDS OF CANCELLATION BY CLEAR, UNEQUIVOCAL AND CONVINCING EVIDENCE.

It has been held by a long and invariable list of authorities that an insurance company can avoid liability by reason of fraud of the insurer or his agent only upon a showing of such fraud by clear, un-

equivocal and convincing evidence. This rule is specifically laid down in the following cases.

Missouri State Life Insurance Co. v. Guess, 17 Fed. (2d) 450;

De Laine Co. v. James, 94 U. S. 207; 24 L. Ed. 112.

In the case of *Fidelity & Casualty Co. v. Phelps,* 64 Fed. (2d) 233, it was held that in order to invalidate a policy, the insurer must show "by clear and convincing proof" the falsity of any warranties made by the insured, and the proof of such falsity "must be such as to entirely satisfy the chancellor's conscience."

VI.

IT IS ALSO THE RULE THAT PROVISIONS OF AN INSURANCE POLICY ARE TO BE CONSTRUED SO AS TO PREVENT A FORFEITURE, IF THE LANGUAGE WILL REASONABLY PERMIT SUCH A CONSTRUCTION.

The above stated rule is a general one and applies to the construction of insurance contracts as well as to all other contracts. It is based upon the principle that the law does not favor forfeitures and is disposed to do what it reasonably and consistently can to avoid them. We will but refer to a few California cases, in which the rule has been applied in the construction of insurance policies.

O'Neill v. Caledonian Ins. Co., 166 Cal. 310, 315;

Arnold v. American Ins. Co., 148 Cal. 666;

Cronenwett v. Iowa Underwriters, 44 Cal. App. 571.

VII.

THE POLICY ISSUED TO DR. CARFAGNI IN 1931 AND SUED UPON HEREIN IS A SEPARATE CONTRACT, AND THE COURT SHOULD ONLY CONSIDER WHETHER DR. CARFAGNI OR HIS BROKER COMMITTED A MISREPRESENTATION AT THE TIME THAT THE POLICY OF 1931 WAS APPLIED FOR OR ISSUED.

Any statement as to the cancellation or refusal of prior insurance in connection with Dr. Carfagni contained in the application for the policy of 1931 was inserted by agents or representatives of the appellee, without at the time consulting Dr. Carfagni or his broker. This is conceded without dispute. It was improper to permit the introduction of evidence that Mr. Payne, the broker for Dr. Carfagni, had made a misrepresentation upon the occasion of the issuance of the first policy by the appellee to Dr. Carfagni in June, 1929, particularly since the appellee in its answer in the instant case does not rely upon any alleged misrepresentations made in 1929, but attempts to defend this action upon alleged misrepresentations contained in the application for the policy of 1931. The authorities hold that the renewal of an insurance policy constitutes a new contract which is separate and distinct from previous policies.

The case of

Kentucky Vermouth Co. v. Norwich United F. Ins. Co., 146 Fed. 695, 701,

declared that

> "each renewal of a policy was a new contract, was upon a new consideration and was optional with both parties." (Citing cases.)

The same rule was declared in the case of

Danvers Bank v. National Surety Co., 166 Fed. 671,

in which it was held that where new applications were required for each renewal, each renewal constituted a separate and independent contract. It was thus determined that each renewal contract depended for its efficacy upon the statements or representations contained in its respective application.

See also

Pacific Mutual Life Insurance Co. v. Vogel, 232 Fed. 337;

In the case of

Steele v. Great Eastern Casualty Company (Minn. 1924), 197 N. W. 101,

it was held that

> "where a policy of accident insurance contained no provision for continuing it in force beyond the time specified therein, but was continued in force for an additional period by a subsequent agreement, such agreement constituted a new contract."

It is important in this case to confine ourselves exclusively to the question as to what was said by either Dr. Carfagni or Mr. Payne, his broker, at the time application was made for the policy sued upon herein, the one issued to Dr. Carfagni on June 1, 1931. Any statements made by the assured, or his broker, in the application for the policy of 1929 are immaterial in the instant case. If, for example, a policy of public liability insurance had been cancelled on Dr. Carfagni in 1927, he could not truthfully have

answered in his application for the policy issued by the appellee to him in 1929, that no insurance had been cancelled or refused to him within three years prior thereto. Upon the same hypothetical state of facts, however, he could have answered in his application for the policy of 1931 that no company had cancelled or refused insurance to him during the three years prior thereto, for the reason that a cancellation in 1927 would have been before the period of three years. Likewise, if Dr. Carfagni in his application for the policy of 1929 had truthfully declared that no other company had within three years prior thereto cancelled or refused to issue any insurance for him, the appellee company in 1931 was not justified in filling in the declaration in the application for the policy of 1931 in reliance upon the statements made by Dr. Carfagni in his application to the appellee for the policy issued in 1929. The evidence for example in this case shows that (Tr. pp. 232-33) the Pacific Employers Insurance Company on June 11, 1929, after the appellee had issued its first policy of insurance to Dr. Carfagni, cancelled a policy of insurance on him. Since Dr. Carfagni had made application for and received his first policy of insurance from the National Union Indemnity Company before the Pacific Employers Insurance Company (or the Washington Underwriters) cancelled its policy of insurance on him, he did not commit a breach of warranty in failing to mention this cancellation in his application to the appellee company for this first policy issued by it to him in 1929. The evidence further shows that in April, 1929, Dr. Carfagni purchased

a Diana automobile, in addition to his Lincoln sedan (Tr. pp. 72, 73) and that he placed insurance for this Diana automobile in companies other than the appellee company. If, for example, some other insurance company had, in the year 1929 or 1930, cancelled the policy of insurance which Dr. Carfagni had on his Diana automobile, that fact would not be revealed in the application which he made to the National Union Indemnity Company for the policy issued to him in 1929. Moreover, if the policy sued upon herein had run to expiration and had been renewed in 1932, and if the accident in which Mrs. Eddy was killed had occurred in June, 1932, instead of 1931, then the appellee could not avoid liability because of alleged misrepresentations concerning the cancellation of prior insurance in the application for the 1929 policy, for the reason that such cancellations would have occurred more than three years before. Thus, the fact that certain alleged misrepresentations were included in the application for the 1929 policy would not give the agents of the appellee the right to fill in the answers to the declarations in the application for the 1931 policy, solely upon the information contained in the former application for the policy of 1929.

The theory upon which the defendant relies is that a misrepresentation was made by Dr. Carfagni's broker in applying for the policy issued in 1929, and that by reason of this circumstance, the appellee company was justified in having its agent insert the same statements in the application for the policy sued upon herein, which was issued in 1931, without making

inquiry of the assured or his broker. As we have shown elsewhere, in this brief, the agent of the appellee insurance company was not justified in inserting in the application for the 1931 policy the same answers as were previously set forth in the policy for 1929. The uncontradicted evidence shows that Dr. Carfagni never read any of the policies issued to him by the appellee company, but that he permitted them to remain in the possession of his insurance broker. The uncontradicted evidence further shows that Mr. Payne, Dr. Carfagni's broker, retained the policy sued upon, together with the other policies issued to Dr. Carfagni, in his safe, and that he did not read the policy in the instant case, save to check up on the provisions respecting the amount of insurance specified, the make, model and number of the car and the date of inception and expiration. Neither Dr. Carfagni nor Mr. Payne ever noticed that the policy contained a misstatement with respect to the cancellation or refusal of prior insurance.

VIII.

THE UNCONTRADICTED EVIDENCE SHOWS THAT AT THE TIME THE POLICY SUED UPON WAS APPLIED FOR AND ISSUED, THE AGENT OF THE APPELLEE INSERTED THE ERRONEOUS DECLARATION IN THE APPLICATION WITHOUT CONSULTING DR. CARFAGNI OR HIS BROKER, AND IN SUCH A CASE, THE DECISIONS OF BOTH STATE AND FEDERAL COURTS COMPEL A JUDGMENT FOR THE PLAINTIFFS HEREIN.

It is well settled by the decisions of the federal courts, as well as those of the state of California,

that, under the circumstances of the instant case, if an insurance company, through its agent, erroneously inserts "No Exceptions" in answer to a question whether the assured ever had prior insurance cancelled, without at the time inquiring that information from the insured, it may not avoid liability because of a misstatement in the policy concerning the cancellation of prior insurance, even though the insured or his agent had signed the application and retained the policy containing the misstatement.

The testimony of Mr. Payne, the broker, corroborated by the testimony of Mr. Phillip Sullivan, the general underwriting agent for the appellee, constitutes a preponderance of evidence that neither Mr. Payne nor Dr. Carfagni said anything upon the subject of prior insurance or its cancellation or refusal at the time the appellee issued its first policy of automobile public liability to Dr. Carfagni in June, 1929. Moreover, the evidence, *without contradiction or dispute,* shows that nothing was said either by Dr. Carfagni or by Mr. Payne, his broker, upon the subject of cancellation or refusal of prior insurance, at the time application was made to the appellee for the second policy of insurance issued to Dr. Carfagni in June, 1930, or for the policy sued upon herein, which was issued to Dr. Carfagni by the appellee in June of 1931. The appellee in its answer definitely and distinctly relies for its defense upon the alleged misrepresentation contained in answer to declaration No. 9 of the application for the policy issued by the appellee to Dr. Carfagni, *on or about May 13, 1931.* The appellee does not contend that any

misrepresentation contained in the application for the original policy issued by it to Dr. Carfagni in 1929 should operate as a defense to this action. The uncontradicted evidence, however, shows that the agents and representatives of the appellee inserted the answer to declaration No. 9 in the application for the policy of 1931, without making at that time any inquiry of Mr. Payne or of Dr. Carfagni, and without discussing with either of them at that time the subject of the cancellation or refusal of prior insurance. We submit that not only does the preponderance of the evidence show that no representation was made by Dr. Carfagni or his broker at the time the original policy was issued by the appellee to Dr. Carfagni in the year 1929, but that the *undisputed evidence* proves that no misrepresentation was made by Dr. Carfagni or on his behalf in connection with the issuance of the policies of 1930 and 1931. It will further be borne in mind that the evidence without dispute or contradiction shows that Dr. Carfagni never had possession of any of the policies issued to him by the appellee company, but that he permitted them to remain in the safe-keeping of his broker. The undisputed evidence also establishes that Dr. Carfagni never read any of his policies, and that Mr. Payne only read those provisions respecting the dates of inception and expiration, the amount of the coverage and the description of the automobile. The testimony without dispute shows also that neither Mr. Payne nor Dr. Carfagni ever noticed that any of the policies contained a misstatement concerning the cancellation or refusal of prior insurance.

With this state of the evidence in mind we cite the case of

Davern v. American Mutual etc. Co. (N. Y. 1925), 150 N. E. 159, 43 A. L. R. 522,

in which an agent of the insurance company inserted the answer "No Exceptions" to a question in the application as to whether any company had previously refused to issue or renew automobile liability insurance to the plaintiff. The evidence showed that the plaintiff who had signed the application containing the misstatement had not affirmatively stated to the agent that no prior insurance had been refused or cancelled to him. The Circuit Court of Appeals of New York held that under the circumstances, the insurance company was estopped from setting up the falsity of the declaration in defense to a suit upon the policy.

In the case of

Pacific Employer Co. v. Arenbrust, 85 Cal. App. 263,

the court affirmed an award in favor of the plaintiff and held that if an agent of an insurance company incorrectly fills in certain matters in the application for insurance, the insurer is estopped in an action upon the policy to set up the falsity of the statements. The case further holds that an agent, whether he be a general agent or merely a soliciting agent, is the agent of the insurer in filling out the application for the policy, even though the policy itself purports to limit his authority.

In the case of

Dunne v. Phoenix Insurance Co., 113 Cal. App. 256,

the insured signed an application containing a false warranty, which was inserted by an agent of the insurance company, without consulting the insured. In rendering a judgment in favor of the insured, it was held that under such circumstances, it will be presumed that the insurance company wrote the policy on its own knowledge, and so the insurance company was not permitted to avoid liability on the policy, because of the alleged false warranties.

In the case of

Sam Wong v. Stuyvesant Insurance Co., 100 Cal. App. 109,

the insurance company issued a policy containing alleged false warranties, which were inserted therein by an agent of the insurer, without consulting the insured. The court held that under the circumstances, the insurance company waived and was estopped from setting up any of the alleged breaches of warranties contained in the policy.

The case of

Hutchings v. Southwest Automobile Insurance Co., 96 Cal. App. 318,

was one in which an agent of the insurance company inserted a false warranty in a policy, without at the time consulting the insured. It was held that the conduct of the agent in inserting a false warranty in the policy, without at the time consulting the assured estopped the insurance company from setting up the alleged breach of warranty in defense to an action on the policy. The court arrived at this conclusion, even though the plaintiff had retained in his possession his policy containing the false warranty.

We invite the court's attention to the following California cases, all of which hold that the beneficiary can recover when a policy or the application therefor contains a false warranty, provided the warranty was inserted in the application or the policy by an agent of the insured without at the time consulting the insured.

Cal. Bldg. Maintenance Co. v. Indemnity Insurance Co., 214 Cal. 608;
Parrish v. Rosebud etc. Co., 140 Cal. 635;
Wheaton v. North British etc. Co., 76 Cal. 415;
Menk v. Home Insurance Co., 76 Cal. 50;
Lyon v. United Moderns, 148 Cal. 470.

See finally the case of

Schwartz v. Royal Neighbors etc. Co., 12 Cal. App. 595,

in which the plaintiff was allowed to recover, even though the application which he signed contained false warranties, and despite the fact that the terms of the policy prohibited an agent from waiving any of the conditions of the policy. In that case the evidence showed that an agent of the insured had inserted the erroneous warranties in the application without at the time consulting the insured.

The rule of the decisions in the federal courts is the same as it is in the courts of California in a situation where, as here, an agent of an insurance company inserts a false warranty in an application for an insurance policy, without at the time consulting the insured upon the subject and without the knowledge of the insured. It has been settled that if an agent of an insurance company inserts an erroneous

answer in an application for a policy, without at the time making inquiry of the insured, the company will be estopped from setting up the falsity of that warranty in defense to an action upon the policy, even though the assured signed the application containing the erroneous statement and retained in his possession the policy containing the false warranty.

The case of

McElroy v. British American Assurance Co., 94 Fed. 990 (Circuit Court of Appeals, 9th Circuit); 175 U. S. 728; 44 L. Ed. 340.

involved a policy which provided that no additional insurance in excess of $6500 would be allowed except with "the consent of this company written thereon". The policy also provided that it would be void if there were any mortgage or encumbrance upon the ship which the applicant sought to insure. An agent for the insurance company, with knowledge that the ship was mortgaged, nevertheless issued a policy upon it in the sum of $10,000 being $3500 in excess of the amount authorized in the policy. The insurance company in attempting to avoid liability charged a violation of the provisions of the policy with reference to the amount of the insurance and the encumbrance on the property, and denied the authority of the agent to modify the policy by parol agreement. The court awarded a judgment in favor of the plaintiff, even though the plaintiff had retained the policy without reading it, and held that the insurance company was estopped by the conduct of its agent from denying liability. This decision was rendered by this Circuit Court despite the express

wording of the policy that no provision could be waived except "by consent of this company written thereon," and that

> "anything less than a distinct agreement, clearly expressed and indorsed upon this policy, shall not be construed as a waiver of any printed or written conditions or restrictions therein."

The court further cited numerous cases holding that a policy of insurance may be varied by parol, despite any provision to the contrary contained in the instrument.

In the case of

> *McMaster v. New York Life Insurance Company,* 183 U. S. 25, 46 L. Ed. 64,

an agent inserted an erroneous warranty in a policy, without obtaining the information from the assured.

The policy contained a provision, almost identical with that involved in the instant case, that—

> "No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated."

The assured retained the policy containing the erroneous warranty in his possession, but it was held that he could, nevertheless, recover on the policy against the insurance company because the conduct of the agent constituted an estoppel of the insurance com-

pany to set up the alleged breach of warranty in an attempt to avoid liability.

The case of

Rapides Club v. American Union Insurance Company of New York, 35 Fed. (2d) 253,

was strikingly similar to the case at hand. In that case the insurance company filled in the application from the information contained in a former policy. The subsequent policy contained the provision that the company would not be liable if the property insured had any mortgage thereon. The policy further provided that none of its terms could be waived, and that none of the insurance agents could bind the insurer in respect to matters therein contained, except by written rider or paster attached to, and forming a part thereof. The evidence showed that an agent of the insurance company knew of the existence of an encumbrance upon the property insured at the time the policy was issued, and so the court, after citing authority from the Circuit Court of the Ninth Circuit declared, even in the absence of written modification indorsed on the policy, that

> "Defendant is estopped to deny the authority of Merideth to act for it in soliciting the insurance, and that his knowledge should be imputed to it, as a result of which it is now precluded from seeking the avoidance of the policy because of the mortgage in question."

In the case of

Phoenix Insurance Co. v. Warttemberg (9th Circuit), 79 Fed. 245,

the insurance policy provided that

> "no agent or employee of this company or any other person or persons have power or authority to waive or alter any of the terms or conditions of this policy, except only the general agent at San Francisco. Any waiver or alteration by them must be in writing."

The policy further provided that

> "This company will be bound by no statement made to or by the agent, unless embodied in writing herein."

It was further provided in the policy that the insurance was based "upon the representations contained in the assured's application", that "each and every statement * * * is hereby specifically made and warranted and a part" of the policy, and that "it is agreed that, if any false statements are made in said application, this policy shall be void". The policy of insurance contained a warranty that the property insured was not encumbered, whereas in fact there was a mortgage upon the property at the time the policy was issued. The evidence revealed that the agent filled in the application for the policy, without at the time obtaining from the insured information concerning the encumbrance. In sustaining a judgment against the insurer, the Court of Appeals of this Ninth Circuit held that the conduct of the soliciting agent bound the insurance company, despite the limitations of the authority set forth in the policy itself.

It was held that since, as in the instant case, nothing outside of the provisions of the policy showed that

the insurance company would have declined the risk, if it had been aware of the falsity of the statements in the application, the policy was effective, and a judgment in favor of the plaintiff and against the insurance company was affirmed.

See also

Palatine Insurance Co. v. McElroy, 100 Fed. 391 (9th Circuit);

Putnam v. Commonwealth Insurance Co., 4 Fed. 753.

The case of

Fireman's Fund Insurance Company v. Norwood, 69 Fed. 71,

concerned a policy of insurance which provided that it should be void if the insured, at the time or afterwards, had other insurance on the property. The policy further provided that

> "If, without written consent hereon, there is any prior or subsequent insurance, valid or invalid on said property, this policy shall be void."

and declared that

> "only certain specified officials shall have authority to waive or modify the conditions of the policy."

The evidence revealed the assured accepted the policies from the agent without reading them, and it was held even though no official of the company endorsed the waiver, that a violation of the condition with respect to other insurance would not permit the company to avoid liability, since the agent, in issuing

the policies with knowledge of other insurance, estopped the company from setting up the existence of other insurance as a defense to an action on the policy.

In

Knickerbocker v. Norton, 96 U. S. 234, 24 L. Ed. 689,

the court considered a policy which contained the provision that "agents of the Company are not authorized to make, alter or abrogate contracts or waive forfeitures". The policy provided that it would be forfeited upon failure to pay premiums promptly. The evidence showed that an agent of the company had orally agreed to give the insured an extension of time for the payment of the premium, and it was held that this constituted an estoppel of the insurance company to set up the delinquency in payment as a forfeiture of the policy in the case.

In the case of

Union Mutual Co. v. Wilkinson, 80 U. S. 222, 20 L. Ed. 617,

an agent of the insurance company inserted erroneous answers in the application, without at the time receiving the information from the insured. The Supreme Court of the United States held that the insured could recover on the policy, since the erroneous warranties had been inserted by the agent of the company. The court further held that the parol evidence rule did not preclude the insured from introducing evidence that he did not make the false warranty contained in the application and policy.

In

American Life Insurance Company v. Mahone, 88 U. S. 152, 22 L. Ed. 593,

it was held that the insured was not prevented from recovering on a policy, even though the application for it contained some misstatements, which were inserted by the agent of the insurer. In its decision, the court said further:

> "Nor do we think it makes any difference that the answers, as written by the agent, were subsequently read to Dillard and signed by him."

In the case of

Continental Life Insurance Company v. Chamberlain, 132 U. S. 304, 33 L. ed. 341,

an insurance agent erroneously wrote in the application for the policy that the applicant had no other insurance. In sustaining a judgment in favor of the plaintiff against the company, the court held that even though the insured had signed the application containing the erroneous statements, the company was estopped from setting up the falsity of those statements in defense to an action on the policy. This decision was rendered, even though the policy provided that

> "none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing, signed by the president and secretary of the company."

Bank etc. Co. v. Butler, 38 Fed. (2d) 972.

All of the authorities contained under the next two headings in this brief are cogent authority in support of the proposition that if an agent of an insurance company, without at the time consulting the insured, inserts erroneous warranties in the policy or the application therefor, the insurance company will be estopped from avoiding liability on the policy, even though the policy were retained in the possession of the assured or his broker. In order to avoid repetition, we direct the attention of this court to the cases set forth under the next two headings in this brief, as additional authority upon this proposition.

As we have seen, the uncontradicted evidence shows that the subject of the cancellation of prior insurance was not discussed with Dr. Carfagni or his broker at the time application was made for the policy sued upon herein, but the agent of the company inserted the erroneous answer to declaration No. 9 without at the time making inquiry of either Dr. Carfagni or his broker Mr. Payne. The insurance company herein, in its answer relies for its defense upon the alleged breach of warranty contained in the policy of 1931. If this court agrees with our contention that its consideration should be confined to what was said by Dr. Carfagni or on his behalf at the time that application was made for the policy sued upon herein, then, upon the decisions of the courts of the State of California as well as those of federal jurisdictions, we submit that judgment should be rendered for the plaintiff.

IX.

EVEN THOUGH IT WERE CONCEDED THAT MR. PAYNE HAD IN 1929 MADE A MISREPRESENTATION CONCERNING THE CANCELLATION OF PRIOR INSURANCE AND THAT EVIDENCE OF IT WERE ADMISSIBLE IN THIS CASE, THE INSURANCE COMPANY WAIVED AND IS ESTOPPED FROM SETTING UP SUCH MISREPRESENTATION, IRRESPECTIVE OF THE LIMITATION OF AUTHORITY UPON THE AGENT OF THE COMPANY.

The court should not in this case be concerned with the authority of an agent or representative of the insurer to waive or alter any provision of the insurance policy involved herein without the written indorsement of the president or secretary of the insurance company. The trial judge in his opinion (Tr. p. 16) declared that the *appellee insurance company itself* knew of the cancellation of prior policies at the time it issued the policy in suit to Dr. Carfagni. Moreover, in his findings of fact (Para. 4, Tr. pp. 21, 22) the trial judge found that at the time the policy of May 13, 1931, was issued to Dr. Carfagni, the *appellee insurance company* itself knew that prior policies of insurance had been cancelled on Dr. Carfagni or refused to him. We are concerned here with the knowledge of the insurer itself and not with the legal effect of information possessed by an agent or representative of an insurance company. The authority of an agent to waive provisions or conditions of a policy in such a situation is entirely immaterial.

We invite the attention of this court to the case of *Aetna Life Insurance Co. v. Frierson,* 114 Fed. 56,

in which an application for insurance contained a warranty of the applicant that

> "I have not in contemplation any special journey or undertaking except as herein stated."

The application contained no other reference to a journey, although the evidence showed that at the time the application was made, the applicant was planning the trip to Alaska on which he subsequently died. The policy of insurance provided that

> "No agent has authority to waive any condition of this policy; and no waiver will be recognized unless in writing, signed by either the president, vice-president, secretary or assistant secretary of the company."

The evidence revealed that officials at the home office of the insurance company knew that the applicant, at the time the application was signed, was planning a trip to Alaska. The court assumed that the local agent of the insurance company did not have authority to waive any condition of the policy, but yet rendered judgment against the insurance company, and in its opinion expressed the difference between a situation in which the authority of an agent is involved and one in which knowledge of the company itself operated as a waiver of the conditions of the policy. In its decision, the court declared:

> "For the purposes of this case, we shall assume that the manager at Cincinnati, who received the two applications, and the soliciting agent's accompanying communication, did not and could not waive the condition of the policy in respect to any breach resulting from any misrepresentation in the application. * * * The receipt and retention of the premium at the home office of the company as determining to recall

the policy, because unwilling to take the risk incident to the journey and business contemplated by the assured was a distinct election to ratify the contract and continue the policy." (Citing cases.) "This waiver being the act of those officials constituting the 'home office' *was the act of the corporation.* The fact that the premium was received and retained with knowledge of the facts, constitutes in itself a waiver of the right to rely upon the known breach of the condition of the policy. It was likewise a waiver of the stipulation of the policy that 'no waiver will be recognized unless in writing, signed by either the president, vice-president, secretary or assistant secretary'. It was just as competent for the company to dispense with the observance of the condition, being one made for its own benefit as any other." (Citing cases.)

"In Northern Assur. Co. v. Grand View Bldg. Assn. there is nothing in conflict with this. The court there upheld a provision in the policy which required consent to other insurance to be indorsed thereon in writing by the agent issuing the policy. *The waiver they relied on was waiver resulting from the mere knowledge of the agent* that such other insurance existed at the time he issued the policy." (Italics ours.)

The trial court in the foregoing case had found that the insurance company itself knew that the applicant at the time the application was signed, and contrary to the terms of the application, intended to take a hazardous trip. The language of the court clearly illustrates the rule that should prevail when, as here, the *insurance company* was aware, at the time it issued the policy, of the facts which it later

attempts to set up in defense to an action upon the policy.

The case of

Aetna Life Insurance Company v. Smith, 88 Fed. 440,

was one in which the application for the policies provided that no agents could alter or waive any of the provisions of the policy. The evidence showed that agents of the company, contrary to their authority and the express provisions of the policy, were accustomed to accept overdue premiums without requiring a guaranty that the insured was in good health. It was held that since an executive officer of the insurer had notice of such a practice of the agents of the company, the company itself was deemed to have waived the provisions in the policy requiring a guaranty of good health of the assured before a policy would be reinstated after death in the payment of premium. We need hardly elaborate upon the applicability of the foregoing authority to the instant case in which not only an executive officer of the insurance company had knowledge of the alleged breach, but the insurance company itself was aware of the facts which it now seeks to set up in defense to an action on the policy.

In the case of

Hanover Fire Insurance Co. v. Dallavo, 274 Fed. 258, 261, 262,

the policy provided that it would be avoided if the insured did not absolutely own the real property involved. The evidence showed that the property was only leased by the insured, but the court sustained a judgment for the plaintiff and declared:

> "The insurance company may, however, waive any provisions in a policy for its protection, including even the provision that the waiver must be endorsed upon the contract itself."

The court further distinguished between the knowledge of a mere agent and the knowledge attributable to the company itself. See also for a quotation of the same language:

> *Continental Insurance Co. v. Fortner,* 25 Fed. (2d) 398.

In the case of

> *Diebold v. Phoenix Insurance Co.,* 33 Fed. 807,

the court considered the effect of the following stipulation in an insurance policy:

> "If the interest of the insured in the property be any other than an absolute fee simple title, or if any other person or persons have any interest in the property described, whether it be real estate or personal property, * * * it must be so represented to the company, and so expressed in the written part of this policy; otherwise, the policy shall be void."

The plaintiff, who was unable to read English, was not the absolute owner of the property insured. The testimony further showed that the plaintiff relied on the agent of the defendant to properly prepare the application for insurance, and the court allowed judgment for the plaintiff. In its decision, the court held that if the agent had been authorized by the insurance company to sign and issue policies, it clearly had no defense, but that even though the agent were not authorized to complete the contract of insurance, the

insurance company having had notice that the plaintiff did not own the property in fee, could not avoid liability on the policy.

In the case which we here consider, the insurance company likewise, according to the finding of the court, knew the truth of the facts which it sets up in an attempt to avoid liability.

The case of

Continental Life Insurance Co. v. Chamberlain,
132 U. S. 304, 33 L. Ed. 341,

involved an insurance policy which provided that

> "none of its terms can be modified nor any forfeiture under it waived except by agreement in writing signed by the President or Secretary of the Company, whose authority for this purpose will not be delegated."

The policy contained the question "has the said party (the applicant) any other insurance on his life; if so, where and for what amounts?" and the answer "no other" in response thereto. The evidence revealed that at the time the applicant had insurance in a cooperative society, but the agent of the insurance company informed the applicant that this information need not be included in the declaration. The court sustained a judgment against the insurance company and said:

> "It could not be doubted that *the company* would be estopped to say that insurance in cooperative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract." (Italics ours.)

The case of

Phoenix Mutual Life Insurance Co. v. Raddin,
120 U. S. 183, 30 L. Ed. 664,

was a case in which the insurance company issued a policy of life insurance upon an application which misstated the habits and character of the applicant. The court refused to permit the insurance company to avoid liability on the ground of breach of warranty, because the evidence showed that the *insurance company* itself had knowledge of the true character and habits of the assured. The Supreme Court upheld the instructions of the court to the jury in the following language:

> "The substance of the instructions to the jury on this part of the case was as follows: The judge directed the jury that if they should find that the assured was addicted to the habitual use of spirituous liquors at the date of the policy, or his habits afterwards changed in this respect so as to make the risk more than ordinarily hazardous, they would consider whether there had been a waiver on the part of the insurance company. The judge then told the jury that the plaintiff not only claimed that any misrepresentation as to the habits of the assured, or failure to inform the company of a change in those habits, *had been waived by the company* by accepting payment of a premium on or about April 25, 1921, after it had knowledge of the habits of the assured, or of the change in those habits; but further claimed that mere silence of the company, after knowledge of such change in habits, was a waiver of the violation of the provision of the policy. And the judge did charge the jury upon both the supposed grounds of waiver, instructing

them that *if the defendant had knowledge of the change in the habits of the assured before receiving the premium of April 25, 1921, the acceptance of that premium would be a waiver, which would estop the company to set up that the policy was forfeited,* for a breach of that provision; and further instructing them that if the company, having knowledge of the change in the habits of the assured, did not give notice to the plaintiff of that change, and he was prejudiced in any way by the failure of the company to give such a notice, and by reason of this silence of the company, did any act, or omitted to do any act, which prejudiced him, there was a like waiver and estoppel on the part of the company." (Italics ours.)

In the case of

Tennant v. Travellers Insurance Company (Circuit Court, Northern District of California), 31 Fed. 322,

the court considered a policy which provided:

"that no waiver shall be claimed by reason of any act or acts of any agent unless such act or waiver be specially authorized in writing over the signature of the President or Secretary of the company."

The policy had expired but an agent of the insurer had delivered renewal receipts to the insured before having received the premiums due thereon from the insured. The insured died and after his death, his heirs paid the premiums due on the renewal policy to the insurer. The policy contained a provision that the actual payment of the premium before the occurrence of an accident was a condition precedent to

liability on the policy. The court declared, however, that:

> "The evidence further shows that, notwithstanding a clause of the policy to the effect that the actual payment of the premium before the happening of any accident is a condition precedent to its binding force, and that no waiver shall be claimed by reason of any act or acts of any agent unless such act or waiver be specially authorized in writing over the signature of the president or secretary of the company, the custom of the agents of the defendant was to give credit on the premiums, and such custom was acted on by the patrons of the company generally, and by the deceased in the present case, *and was approved and ratified by the company by receiving and retaining, with full knowledge of the facts*, the premiums paid pursuant to such credit. There is no difficulty, therefore, in holding that the policy in suit was continued in force until noon of June 20, 1885, by virtue of the delivery to the insured of the renewal receipts, and the subsequent receipt and retention by defendant of the premiums due thereon." (Italics ours.)

In the instant case the court found that the *insurer* knew of the cancellation of prior policies at the time it issued the policy sued upon herein to Dr. Carfagni. (Tr. pp. 16, 21.) The evidence without contradiction showed (Tr. p. 77) that in this case the *insurance company*, although having knowledge of the cancellation of prior insurance, accepted a premium in the sum of $176.82 on the policy for which application had been made on May 18, 1931. The uncontradicted evidence also discloses that the appellee company,

after the accident, having knowledge of the prior cancellations and purporting to act as though the policy were still in force, sent Dr. Carfagni's Lincoln sedan automobile to Larkins & Co. for repairs, but later refused to pay the bill which it had incurred for the work. (Tr. pp. 104, 105.)

In the case of

Standard Life & Accident Insurance Co. v. Fraser (9th Circuit), 76 Fed. 705,

the court affirmed a judgment in favor of the plaintiff in a situation in which the applicant stated in his application that his occupation was the

> "proprietor of a bar and billiard room, not tending bar".

Evidence showed that he tended bar occasionally at lunch or during meal hours. The court held, in sustaining the judgment for the plaintiff, that

> "A provision in the application and policy that no agent can waive any provisions of the policy does not protect the company, where the applicant truly states the facts, and then answers in accordance with the agent's advice as to the effect of such facts."

In the case of

Mutual Reserve Fund v. Cleveland Woolen Mills, 82 Fed. 508,

it was held that

> "An agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing, may itself be changed by a parol agreement made in behalf of the company by a general officer, such as its secretary."

In the case of

Phoenix Mutual Life Insurance Co. v. Doster, 106 U. S. 30, 27 L. Ed. 65, 67,

the Supreme Court approved instructions of the trial court which told the jury that if the insurance company, having knowledge of the fact that its agents were accustomed occasionally to receive overdue payments, made no objection

> "the insured had a right to believe that the Company waived a strict compliance, and they might find that there was a waiver by the Company of the forfeiting clause of the policy."

The case of

Thomas v. Charles Baker & Co., 60 Fed. (2d) 1057,

concerned a policy containing the stipulation that

> "No agent is authorized to make any alteration, in or addition to, this policy, or to waive any of its terms, conditions or stipulations, and no addition to or alteration in, or waiver of, any of the terms, conditions or stipulations of this policy shall be valid unless expressed in writing and signed by the President or a Vice President of the Company, nor shall notice to, or knowledge of, any agent or any other person be held to effect a waiver or change in any part hereof."

The policy provided that no loss occurring prior to the payment of the premium should be covered by the policy even though the policy had been delivered. The evidence showed that the claimant had only paid a part of the premium due under the policy, but the court held that

> "The delivery of a policy, reciting the consideration of a premium *and counter-signed by the agent by whom it is required by its terms to be counter-signed, estops the Company in saying that the premium was not paid.*" (Citing cases.)

It will be remembered that under the provisions of Section 633(d) of the California Political Code, which applied to the policies of the kind issued by the appellee company to Dr. Carfagni, it was necessary for the local agent of the appellee insurance company to approve and countersign each policy before such policy could under the law of California become effective.

In the case of

> *Mutual Life Insurance Co. v. Logan* (Circuit Court of Appeals, 9th Circuit), 87 Fed. 637,

it was held that when a general agent of an insurance company has knowledge that a subagent is violating a rule of the company in accepting notes in payment of premiums and makes no serious objection thereto, the company must be deemed to have waived the application of the rule.

In the case of

> *Continental Life Insurance Co. v. Chamberlain,* 132 U. S. 304, 33 L. Ed. 341,

an agent of an insurance company wrote in the application for the policy that the applicant had no other insurance, although the applicant had informed the agent that he had certificates of membership in cooperative companies. In sustaining a judgment in favor of the plaintiff and against the insurance company, the court held that even though the insured signed the

application containing the erroneous statements, the company was estopped from setting up the falsity of those statements in defense to an action upon the policy. The policy further provided that

> "none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing, signed by the president and secretary of the Company." * * *

It was held that a statute of Iowa provided that

> "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company" * * *

operated so as to make the insurance company responsible for the knowledge and conduct of its soliciting agent.

The distinction between the knowledge of an agent, and the knowledge of the company by whom he is employed, is well illustrated in the language of the Supreme Court of the United States in the case of *Northern Assurance Company v. Grand View Building Association,* 183 U. S. 308, 46 L. Ed. 213. In that case, which was strongly relied upon by the defendant at the trial of this case, the court held that a provision in the policy limiting the authority of an agent to waive a condition operated so as to relieve the insurance company from any estoppel or waiver arising out of the knowledge of a soliciting agent, at the time the policy was issued, of certain breaches of warranty. The court, however, affirmed at page 235

> "that, where waiver is relied on, the plaintiff must show that the *Company,* with knowledge of

> the facts that occasioned the forfeiture, dispensed with the observance of the condition;"

and, at page 233, the court, in quoting from a former decision of the Supreme Court, declared:

> "Not only should the *Company* have been informed of the forfeiture before it could be held by its action to have waived it, but it should also have been informed of the condition of the health of the insured at the time the premium was tendered, upon the payment of which the waiver is claimed." (Italics ours.)

In the case of

> *St. Paul Fire & Marine Insurance Co. v. Ruddy,* 299 Fed. 189,

the court was concerned with an insurance policy which provided that

> "no officer, agent or other representative of this Company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon;"

The policy also provided that it should be void

> "if the interest of the insured be other than unconditional and sole ownership * * * or if any change other than by the death of the insured take place in the interest, title or possession or subject of insurance * * * whether by legal process or judgment or by voluntary act of the insured or otherwise * * *"

After the policy was issued, the original owner of the premises sold them to the plaintiff. The evidence

showed that the insurance company knew of the transfer, but in failing to cancel the insurance promptly, permitted the plaintiff to believe that the policy was still in effect. The court, in reversing the action of the lower court in directing a verdict for the defendant, declared at page 195 that

> "any act done by an insurer after knowledge of the breach of the condition which recognizes the continued existence of a policy constitutes a waiver of its right to avoid the policy." (Citing many cases.)

See the case of

> *Firemen's Fund Insurance Co. v. Globe Navigation Co.* (Circuit Court of Appeals, 9th Circuit), 236 Fed. 618,

in which it is declared that

> "any forfeiture of a policy caused by a violation of its terms will be deemed waived by the insurer, if, after knowledge of the facts constituting such forfeiture he treats the policy as obligatory."

It will further be remembered that the appellee company received premiums and sent Dr. Carfagni's car to be repaired at considerable expense, after having had knowledge of the facts giving it the right to rescind the policy or to avoid liability on it. Under such circumstances, the insurer must be held to have indulged in conduct inconsistent with denying liability upon the policy, and so it must be held that the insurance company cannot now successfully avoid liability, by reason of circumstances arising before it indulged in such conduct.

In the case of

Aetna Life Insurance Co. v. Smith, 88 Fed. 440, the evidence showed that the renewal receipts of the company *contained specific provisions that no agent had authority to renew a policy without obtaining from the insured, where an overdue premium was being received, a written guaranty of the good health of the assured.* The testimony further showed that the frequent practice of the agents was to receive overdue payments, without requiring such a guaranty and in violation of their authority. In sustaining the judgment against the insurance company, the court held that the company should have had knowledge of the practice of its agents in accepting overdue premiums without requiring the guaranty of good health, and so it was decided that the *company* had waived such a requirement. The court further declared:

> "Where, in violation of the rules of the company, it is the practice of its agents to accept overdue premiums without requiring a guaranty that the insured is in good health, and this course of business is shown to be such that a reasonably prudent man, acting in the capacity of an executive officer ought to have known of it, this is sufficient to warrant a finding that the executive officer of the company did in fact have knowledge of the practice."

The uncontradicted testimony of Mr. Philip B. Sullivan, who was the general underwriting agent of the appellee at the time of the issuance of the first policy of insurance to Dr. Carfagni (Tr. pp. 157-161), is that it was customary for the appellee insurance

company, as well as for other companies, to issue policies with the statement "no exceptions" in answer to declaration No. 9, referring to the cancellation or refusal of prior insurance, without making inquiry of the insured or his broker. Mr. Sullivan further asserted that in the practice of the underwriters, such a statement was construed as meaning that further information upon the subject was lacking.

Moreover, Mr. Payne, a broker with 27 years of experience, declared that "no exceptions" is inserted automatically by insurance agents in answer to such a declaration in 95 per cent of the policies issued (Tr. pp. 108, 109) and that he has never heard or, insofar as his knowledge goes, known, of an agent making specific inquiry upon the subject of cancellation or refusal of prior insurance. Under this state of facts, we submit that the conclusion is inescapable that the appellee insurance company itself had knowledge of the practice of its agents in inserting "no exceptions" in answer to the inquiry respecting the cancellation of prior insurance, without consulting the insured or his broker. Under the authorities which we have cited, the insurance company must be held to have waived its right to avoid the policy because of any misstatement concerning the cancellation of prior insurance, if it had knowledge that its agents, without consulting the applicants, were inserting answers upon this subject in the applications, even though the agents did not conform to the requirements of the policy that they have written authorization before they would be empowered to waive or modify any terms of the policies.

In the case of

Mutual Reserve Fund Life Association v. Cleveland Woolen Mills, 82 Fed. 508,

it was held that

> "An agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing may itself be changed by a parol agreement made in behalf of the company by a general officer such as its secretary."

The foregoing decision was rendered upon the principle that a secretary of a corporation as such a general officer has authority to bind the corporation by an oral waiver of a condition of the policy which explicitly required a waiver to be "in writing and signed by the president and one other officer of the Association".

In the instant case the court found (Tr. pp. 21, 16) that the *appellee company itself* knew of the prior cancellations of insurance on Dr. Carfagni when it issued the policy sued upon herein to him in 1931, and so the appellee company cannot rely on any failure of an agent to have written authority to waive the provisions of a policy for the purpose of avoiding liability.

In the case of

Knickerbocker Life Insurance Company v. Norton, 96 U. S. 234, 24 L. Ed. 689,

the Supreme Court of the United States considered a situation involving a policy which provided that

> "Agents of the Company are not authorized to make, alter or abrogate contracts or waive forfeitures."

The policy contained a further provision that it should be void, without notice to the assured, if the premiums were not paid promptly. Since the evidence showed that the insurer permitted its agents occasionally to extend the time for the payment of premiums by the assured, it was held that the *insurer,* by its knowledge, had waived the condition of the policy with respect to the prompt payment of premium. In its decision, we find the following language:

> "The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the Company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the Company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The Company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the *Company* could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it

did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing.

That it did authorize the agents to take notes, instead of money, for premiums, is perfectly evident from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice." (Italics ours.)

See also the case of

New York Life Insurance Company v. Eggleston, 96 U. S. 572, 24 L. Ed. 841,

in which it is held that if the *insurance company* had knowledge of facts which would ordinarily constitute a breach of warranty, it waives any such breach, if it continues to treat the policy as being in force, even though the policy provides that agents of the insurer should have no authority to waive its provisions.

In the case of

Globe Mutual Life Insurance Company v. Wolff, 95 U. S. 326, 24 L. Ed. 387,

the court held:

"The conditions mentioned in the policy could, of course, be waived by the *Company* either before or after they were broken; they were inserted for its benefit, and it depended upon its pleasure whether they should be enforced. * * *

The company, notwithstanding the provision in the policy that its agents were not authorized to waive other forfeitures, sent to them renewal receipts signed by its Secretary, to be used when

> countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agents. The propriety of their use in the absence of any authority in the matter, could not afterwards be questioned by the Company. So far, then, as the waiver of the forfeiture incurred for non-payment of the premiums is concerned, it is clear that *the Company by its course of dealing had,* notwithstanding the provision of the policy, *left the matter to be determined by its local agent to whom the renewal receipts were endorsed.*" (Italics ours.)

The foregoing quotation from a case which involves a policy containing restrictions on the authority of an agent to waive conditions of the contract, is applicable to the instant case as illustrating the distinction between the information possessed by an agent and the knowledge of his employer as to facts constituting an alleged breach of warranty.

In the case of

Phoenix Mutual Life Insurance Co. v. Doster,
106 U. S. 31, 27 L. Ed. 65,

the policy involved contained a provision that no agent had authority to receive premiums after the time fixed for their payment or to waive any forfeiture of the policy. The evidence showed that the agent, with notice to the home officers of the company, had frequently received overdue payments and had given receipts therefor. In affirming a judgment against the insurance company, the Supreme Court of the United States held that the insurance company had waived its right to declare a forfeiture of the policy and despite the provision of the policy requiring written

authority of the agent, declared that the waiver of the forfeiture

> "was a fact provable by parol evidence, as well as by writing, for the reason that it could be done without writing."

Citing

Insurance Co. v. Norton, 96 U. S. 239, 24 L. Ed. 689;

Insurance Co. v. Eggleston, 96 U. S. 577, 24 L. Ed. 841.

In the case of

Mutual Reserve Fund Assn. v. Cleveland Mills, 82 Fed. 508,

it was held that

> "an agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing may itself be changed by a parol agreement made in behalf of the company by a general officer * * *"

The following cases explicitly enunciate the rule of federal jurisdictions that if an agent, without consulting the insured, inserts incorrect answers in an application, the insurer is estopped from setting up the misstatement, even though the policy provided that the falsity in any application would avoid liability on the policy, and contained a statement that the agent was not authorized to waive any condition of the policy:

Sawyer v. Equitable Accident Insurance Co., 42 Fed. 30;

Lueder's Executors v. Hartford Insurance Co., 12 Fed. 465;

Langdon v. Union Mutual Life Insurance Co., 14 Fed. 272;

Standard Life Insurance Co. v. Fraser (9th Circuit), 76 Fed. 706;

Mutual Benefit Life Insurance Co. v. Robison, 58 Fed. 723;

Continental Life Insurance Co. v. Chamberlain, 132 U. S. 304, 33 L. Ed. 341;

Phoenix Insurance Co. v. Warttemberg, 79 Fed. 245.

It is well settled in California that when an insurance company issues a policy upon facts known to it, it waives the breach of any conditions or warranties of the policy inconsistent therewith. In the case of

Allen v. Home Insurance Company, 133 Cal. 29, 33,

the court said:

> "The issue of a policy upon known facts waives all conditions inconsistent therewith."

In that case the defendant itself was aware of the untruth of the warranties, the breach of which it attempted to set up in avoidance of liability.

For a statement of the same rule in a case in which the defendant itself knew at the time the policy was issued of certain facts inconsistent with the application, see:

Loring v. Dutchess Insurance Company, 1 Cal. App. 186,

in which the court held that:

> "The issuance of a policy of fire insurance upon known facts waives all conditions inconsistent therewith."

In the case of

Breedlove v. Norwich Insurance Society, 124 Cal. 164, 169,

it was held that if the defendant at the time of issuing the policy knew of facts inconsistent with a warranty thereof, it waived the right to set up those facts as an alleged breach of warranty.

See also:

Bayley v. Employers etc. Co., 125 Cal. 345.

The conduct of the appellee is particularly significant as constituting an estoppel of the National Union Indemnity Company from relying upon an alleged breach of warranty in connection with declaration No. 9, which referred to the cancellation or refusal of prior insurance. The undisputed testimony of Mr. Payne shows (Tr. p. 109) that the answer "no exceptions" in declaration No. 9, is inserted by an agent of the insurance company without consulting the insured, in 95% of the policies issued. Mr. Payne further testified that no company, within his knowledge, during a wide brokerage experience of 27 years, had ever denied liability because of the falsity of the answer "no exceptions" in response to an inquiry as to the cancellation of prior insurance.

The unchallenged testimony of Mr. Philip B. Sullivan, who was the general agency superintendent for the National Union Indemnity Company at the time the appellee issued its first policy to Dr. Carfagni in June, 1929 (Tr. p. 152), shows that when an application was made to the appellee for insurance, no questions were ever asked by the local agents

of the appellee concerning the cancellation of prior policies on the applicant. (Tr. p. 157.) The words "no exceptions" in answer to declaration No. 9, referring to the cancellation of prior insurance, were, according to the custom of the appellee and other insurance companies, inserted in the policy without consulting the applicant, as a matter of procedure (Tr. p. 161) to designate that the insurer lacked contrary information. (Tr. p. 160.)

In the case of

Loveland v. U. S., 18 Fed. (2d) 585,

it was held that

> "a course of dealing by an insurer, with knowledge of facts constituting the breach of a condition of a policy, leading the insured honestly to think that conformity thereto will not result in forfeiture, estops the insurer from insisting upon forfeiture."

Mr. Payne (Tr. p. 109) declared that at all times he retained in his own office the policies of insurance which the appellee had issued to Dr. Carfagni. Mr. Payne further declared that when the policies which the appellee issued to Dr. Carfagni were delivered to him, as the broker of the assured, he read those parts of the policies pertaining to the kind of car, the engine number, the name of the assured and his address, and retained them in his safe but did not peruse the policies to determine the correctness of the declaration referring to cancellation of prior insurance. The uncontradicted evidence is that Dr. Carfagni never read any of the policies. The prior conduct of the insurance company in the instant case

induced Mr. Payne to believe that the appellee would not attempt to declare the policy forfeited by reason of any erroneous representation in connection with the answer to declaration No. 9. Under the circumstances, we submit that the appellee company should be declared estopped from declaring a forfeiture by reason of any alleged misrepresentation as to the cancellation of prior insurance, particularly since the appellee company at all times had knowledge of those facts which it now seeks to set up in avoidance of liability.

X.

THE PROVISION OF THE POLICY PURPORTING TO LIMIT THE AUTHORITY OF THE AGENT HAS BEEN MODIFIED BY EXPRESS STATUTE IN CALIFORNIA, SO THAT HIS CONDUCT AND KNOWLEDGE CONSTITUTED EITHER A WAIVER BY THE COMPANY OF THE ALLEGED BREACH OF WARRANTY OR AN ESTOPPEL OF THE COMPANY TO SET UP THE ALLEGED BREACH OF WARRANTY IN AVOIDANCE OF LIABILITY.

In subdivision I of the insurance policy issued by the National Union Indemnity Company to Dr. Carfagni (Tr. p. 53) the authority of an agent of an insurance company to waive provisions of a policy was defined and limited. Subdivision H (Tr. p. 53) of the same policy, however, specified that

> "If any of the provisions or conditions of this policy shall conflict or are inconsistent with the law of the state where this contract is entered into, then such provisions and conditions shall be inoperative in such state, and the state law shall prevail."

In California we have a statute which explicitly describes the authority of an agent of an insurance company in the matter of writing policies. Section 633d of the Political Code reads:

> "No insurance company or other insurer, authorized to transact business in this state, shall make, write, place or cause to be made, written or placed, any policy or duplicate policy or general or floating policy or contract of indemnity or suretyship or renewal of any thereof covering risks located in this state at the time of the execution of any such policy or contract, *except through, or after a risk has been approved in writing by, an agent of the company residing in this state* and regularly authorized to transact such business therein, *who shall countersign all such policies or contracts of indemnity or suretyship or renewals of any thereof so issued,* and receive or be credited with the premium thereon when paid, and who shall also receive any commission paid or allowed on such premium, and no such company or insurer shall by its officers, agents or managers, not residents of this state, write policies or contracts of insurance or suretyship covering risks located within this state at the time of the execution of the policy or contract upon blanks previously countersigned by an agent in this state.
>
> Nothing in this act shall be construed to prevent any such insurance or surety company or other insurer authorized to transact business in this state, from binding at offices outside of this state risks covering in this state; provided, that policies or contracts therefor are thereafter issued by agents of said company or other insurer, who

are residents of this state, as specified above, and who shall receive or be credited with the premium thereon when paid and who shall also receive any commission paid on such premium.

Companies or other insurers writing all policies issued and renewal certificates thereof at offices outside of this state shall be considered as complying with this section; provided, all policies and renewal certificates covering risks in this state are countersigned, after being issued, by an agent of the company or other insurer resident within this state, authorized to do so, who shall keep a record of policies and certificates, so countersigned, including the premium thereon, and such companies and other insurers shall in all respects comply with the conditions of this section."

The effect of the foregoing section of the Political Code of California is to require an insurer to have each policy of insurance issued in California approved in writing by a local agent of the company; otherwise, the insurance cannot be issued. This provision compelling an insurer to obtain the written approval of its agent residing in California before issuing its policies applies also to any renewal of a policy. As a consequence, an insurance company cannot in its policy prohibit an agent from waiving or altering any provision of a policy of insurance, because the law of California declares that an insurance company cannot even issue a policy except with the written approval of an agent resident in California. Certain it is that section 633d of the Political Code of California, according to the fol-

lowing cases, invests the resident local general agent of an insurance company with such a character that knowledge obtained by him as a general agent should be attributable to his employer. If this be so, then it modifies that provision of the insurance policy involved herein, which specifies

> "nor shall knowledge possessed by an agent or by any other person be held to effect a waiver of or a change in any part of this contract." (Tr. p. 53.)

In the case of

> *Bank Savings Life Insurance Company v. Butler,* 38 Fed. (2d) 972,

the statutes of the State of Missouri provided that

> "Any person who shall solicit an application for insurance upon the life of another, shall, in any controversy between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company and not the agent of the assured."

The policy in that case provided that a violation of any warranty rendered it void, but the facts showed that a general agent of the insured knew at the time of receiving the application of certain facts inconsistent with the warranties. The court held that the knowledge of the general agent was the knowledge of the insurance company and affirmed the judgment in favor of the plaintiff against the insurance company.

In the case of

> *Thelen v. Metropolitan Life Insurance Company,* 2 Fed. Supp. 404,

a Missouri statute provided that

> "Any person who shall solicit an application for insurance upon the life of another, shall, in any controversy between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company and not the agent of the assured."

It was held that this statute made

> "the soliciting and collecting agent a general agent, upon whose authority there are no limits, *notwithstanding the express provisions of the policy.*" (Citing cases.)

The court thereupon held that the soliciting agent, *contrary to the terms of the policy,* would have had authority to waive certain provisions of the policy, but decided in favor of the defendant, because the evidence in the particular case did not show that the agent had in fact agreed to waive any provision of the policy.

If the foregoing Missouri statute were held to modify a provision of an insurance policy, so as to authorize an agent to waive provisions of a policy, contrary to the express terms of the policy, then this court should have no hesitancy in deciding that section 633d of the Political Code likewise expands the power and authority of an agent of an insurance company.

The case of

> *Bank of Brunson v. Aetna Insurance Co.,* 203 Fed. 810,

was one which considered the effect of a statute of South Carolina, providing that a soliciting agent should be considered the agent of the insurer. The

policy specifically required the assured to furnish proofs of loss promptly after a fire. A fire occurred, and the assured failed to furnish the proofs of loss, claiming that the soliciting agent had waived the requirement for furnishing proofs of loss. The court reversed a directed verdict for the defendant and held that a state statute, giving the soliciting agent the right to *examine risks and to approve and countersign policies* extended the authority of the soliciting agent, which the policy attempted to limit, and made the soliciting agent such an agent of the insurer that his knowledge of the facts constituting the alleged breach of warranty operated as a waiver, by the company, of any such breach. The court said at page 813:

> "If Dowling & Son were only soliciting agents of the defendant, which is admitted to be a foreign corporation doing an insurance business in the state of South Carolina, then we would not, even in view of the South Carolina statute, feel warranted in holding that they could waive specific requirements of the policy; *however, it appears that the powers conferred upon these agents were much more extensive. It is one of the provisions of the contract that this policy shall not be valid until it is countersigned by the duly authorized manager or agent of the company at Hampton, S. C.*, and upon the policy we find an indorsement as follows:
>
> 'Countersigned by W. H. Dowling, Agent.'
>
> * * * * * * *
>
> It is evident, therefore, that these agents were clothed with authority far beyond that of a mere solicitor. Upon their action depended the validity of the contract, for by their indorsement they

> put life into what may be termed merely a memorandum of agreement, which was inoperative until countersigned by them, and, further, in consenting to the assignment of Langford's interest in the policy to the Bank of Brunson, these agents did an act which the company recognized and accepted as valid and binding.
>
> * * * * * * *
>
> This statute, with the construction and interpretation given it by the court in South Carolina, was a law of the state at the time the policy under consideration was issued, and it became a part of the contract. It is a well-settled principle that the federal courts will, with some well-defined exceptions, adopt the construction placed upon state statutes by the highest court of the state in which such statutes are enacted. The case here does not fall within any of the exceptions."

In the foregoing case the court held that the statute of South Carolina, conferring certain powers upon a soliciting agent of an insurance company, such as to approve risks and to countersign policies, caused his authority to become enlarged, so that notice to him was, in effect, notice to the insurance company itself.

In the case of

Continental Life Insurance Co. v. Chamberlain,
132 U. S. 304, 33 L. Ed. 341,

an agent of the company inserted a statement in the application that the applicant had no other insurance, although the agent knew that he had certificates of membership in cooperative companies. The insurance policy provided that

> "none of its terms can be modified nor any forfeiture under it waived, except by an agreement in writing, signed by the president and secretary of the Company * * *"

There was a statute in Iowa declaring that

> "any person who shall hereafter solicit insurance or procure applications therefor shall be held to be the soliciting agent of the insurance company. * * *"

It was held that this statute operated so as to make the insurance company itself responsible for the knowledge and conduct of its soliciting agent, even though the policy purported to limit it.

In California section 633d of the Political Code, among other things, provides that no insurance company can issue a policy of insurance unless the risk and any renewal thereof be approved by the lawful local agent, and that no policy or renewal thereof can be issued until the local agent has countersigned it. By a parity of reasoning with the foregoing decisions of the Supreme Court of the United States, we submit that section 633d of the Political Code makes the knowledge of the agent attributable to the company itself, irrespective of any attempt in the policy to limit his authority.

In the case of

> *Diebold v. Phoenix Insurance Company*, 33 Fed. 807,

the court was concerned with a policy which contained a provision that if the interest of the assured was less than a fee simple it must be so represented in the application, otherwise the policy would be

void. The policy was issued containing a misstatement in the application as to the interest of the insured, and the insurance company attempted to avoid liability because of the alleged breach of warranty. In rendering a judgment in favor of the plaintiff, the court declared:

> "As it is, can this technical defense be sustained. *If this agent had been one authorized to sign and issue policies, clearly it could not.* And although the agent was only authorized to solicit and prepare applications, and not authorized to complete the contract of insurance, there are, I think, enough other matters to justify me in holding the company liable." (Italics ours.)

It was held in the case of

Hiller v. Conn. Fire Insurance Co. (Mo. 1933), 63 S. W. (2d) 461,

that if an agent of an insurance company has authority to countersign policies, his knowledge is attributable to the insurer and he may waive provisions of the policy for the company, notwithstanding printed stipulations to the contrary in the policy itself.

See

Neimann v. Security Beneficial Assn. (Ill. 1932), 183 N. E. 223.

The case of

Stipcich v. Metropolitan Life Insurance Company, 277 U. S. 311, 72 L. Ed. 895,

was decided after an appeal from the Circuit Court of Appeals for the Ninth Circuit. In that case the applicant for insurance declared in his application for the

policy that he was in good physical condition. After the application had been mailed to the insurance company, but before the policy had been issued, the assured learned that he had the ulcers which later caused his death. The insured communicated this information to the soliciting agent prior to the issuance of the policy, but the information was never inserted in the application or transmitted to the home office of the insurance company. The policy of insurance provided that the breach of any warranty or the falsity of any declaration would absolve the company from liability. The insurance policy contained a further provision that:

> "Any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the applicant, shall not be considered as having been made to, or brought to the knowledge of the company, unless stated in either part A or B of this application."

A statute of the State of Oregon in effect at the time provided that:

> "Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured."

The Supreme Court of the United States reversed a judgment of the lower court in favor of the insurance company, and held that the knowledge of the soliciting agent under the circumstances was in legal effect the

knowledge of the *insurance company* even though the policy contained a provision to the contrary. The court in discussing the effect of the Oregon statute upon the policy of insurance declared:

> "Provisions of this character are controlling when inconsistent with the terms of a policy issued after their enactment. (Citing cases.) Here the statute does more than provide that the soliciting agent in matters relating to the application and policy does not represent the insured. In connection with these matters it makes him the agent of the company, a phrase which would be meaningless unless the statute when applied to the facts of the case indicate in what respects he represented the company. * * * We need not inquire what are the outer limits of that authority, but we think this language plainly makes him the representative of the company in connection with all those matters which, in the usual course of effecting insurance, are incidental to the policy and the delivery of the policy."

In the case of

Stillman v. Aetna Insurance Co., 240 Fed. 462, it was held that where an Iowa statute clothed a soliciting agent with authority to transact business for the company, that fact served to make his knowledge of the falsity of statements in the application attributable to the insurer and to operate as a waiver of the right to avoid the policy by reason of such false warranties.

In the case of

Thomas v. Chas. Baker & Co., 60 Fed. (2d) 1057,

the agent of the insurance company delivered a policy of insurance which contained the express condition that no loss occurring prior to the payment of the premium would be covered by the policy even though the policy was delivered to the assured before the premium had been paid. The policy contained the further provision that

> "No agent is authorized to make any alteration, in or addition to, this policy or to waive any of its terms, conditions or stipulations, and no addition to, or alteration in, or waiver of any of the terms, conditions or stipulations of this policy shall be valid unless expressed in writing, and signed by the President or a Vice President of the Company, nor shall notice to, or knowledge of, any agent or any other person be held to effect a waiver or change in any part hereof."

A loss occurred after the delivery of the policy to the assured but prior to the payment of premium, and the court in allowing judgment for the plaintiff declared at page 1059:

> "The delivery of a policy, reciting the consideration of a premium and *countersigned by the agent by whom it is required by its terms to be countersigned*, estops the company from saying that the premium was not paid." (Italics ours.)

The foregoing decision is particularly persuasive in the situation which we here consider because in each case the policy explicitly denied to the agent any authority to waive or modify any condition or term of the policy. It was held in the foregoing case, how-

ever, despite the limitation of his authority in the policy, that the agent had authority to countersign and approve policies, and because the company had accorded him this authority, it raised his status to such a degree that the knowledge of the agent was attributable to the insurance company itself.

It will be remembered that under the provisions of section 633d of the Political Code of California, which applied to the policies issued by the appellee company to Dr. Carfagni, it was necessary for the local agent of the appellee insurance company to approve and countersign each policy before such policy could become effective. Under the law of California, this section of the code so enhanced and enlarged the authority of the local agent of the National Union Indemnity Company that his knowledge was attributable to the appellee company, despite any limitation set forth in the policy itself. Even a most casual consideration of the evidence will reveal that the local agent of the National Union Indemnity Company, having had in his possession the notices of prior cancellations (Plaintiffs' Exhibits 7, 8, 9 and 10) at the time he issued the various policies of insurance to Dr. Carfagni, knew of those facts which the appellee now attempts to set up as a breach of warranty.

The cases in California unanimously hold that the general agent of an insurance company, authorized to represent it and transact its business at a particular place, has authority to waive the conditions in the policy, so that his knowledge is the knowledge of the insurer itself.

See

Farnum v. Phoenix Insurance Company, 83 Cal. 246.

in which it was held that a local agent who has authority to *countersign a policy of insurance*, has authority to make an oral waiver of conditions of the policy and may even orally waive a condition of the policy requiring any waiver of a condition of the policy to be indorsed in writing upon the policy.

See also, for an expression of the same rule,

Kruger v. Fire & Marine Insurance Co., 72 Cal. 91.

In the case of

Mackintosh v. Agricultural Fire Insurance Co., 150 Cal. 440,

it was held that a local agent having the authority to countersign a policy, could orally waive a condition of the policy requiring that a provision or warranty thereof should be waived except by written indorsement upon the policy.

In the case of

Sharman v. Continental Insurance Co., 167 Cal. 117,

it was held that a local agent of an insurance company, having an authority to countersign a policy, has the same authority to waive the conditions or warranties of a policy as the insurance company itself.

See

Porter v. General Accident Assurance Co., 30 Cal. App. 198.

In the case of

Bank of Anderson v. Home Insurance Co., 14 Cal. App. 208,

it was held that the knowledge of the general agent binds the insurance company, and that the agent may orally waive any provision or warranty of the policy, even though the policy provides that such waiver can only be effected by the indorsement of an executive officer on the policy.

See also:

Raulet v. Northwestern National Insurance Co., 157 Cal. 213;

Knarston v. Manhattan Life Insurance Co., 140 Cal. 57;

Menk v. Home Insurance Co., 76 Cal. 50;

Vierra v. New York Life Insurance Co., 119 Cal. App. 352, 359.

In the case of

Arnold v. American Insurance Company, 148 Cal. 660,

the Supreme Court of California used the following language:

> "We do not consider at all material in this connection the presence of the printed stipulation to the effect that no officer, agent, or representative of the company shall have the power to waive or be deemed to have waived conditions of the policy, unless such waiver shall be written or attached thereto. Such provisions existed in the policies in some of the cases cited, and were not considered effectual to prevent the conduct of the officers of the company from constituting a waiver or estoppel on the company. The doctrine

> is that the company has knowledge when its proper officer has knowledge, and if with such knowledge it leads the insured to rely upon his policy as a valid policy, notwithstanding the breach of condition of which it knows, it will not be heard to allege such breach against a claim for a subsequent loss, accruing at a time when, from the conduct of the company, the insured had every right to believe that his property was protected by the policy."

By reason of the fact that the National Union Indemnity Company admittedly had in its files Plaintiffs' Exhibits 7, 8, 9 and 10 at the time it issued its policies to Dr. Carfagni in 1930 and 1931, there can be no dispute as to the correctness of the finding of the trial judge (Tr. pp. 21 and 22) that the appellee knew of the prior cancellations at the time it issued the policy sued upon herein to Dr. Carfagni. The only possible defense which the National Union Indemnity Company could offer is that the written waiver of the prior cancellations was not made by any agent of the appellee who was authorized in writing by the president or secretary to waive a provision of the policy. (Tr. p. 53.) Under the foregoing authorities, however, particularly when considered in connection with the provisions of section 633d of the Political Code, we submit that the admitted knowledge in the possession of the local agent of the appellee company, with reference to prior cancellations on Dr. Carfagni, is attributable to the appellee itself and is binding upon it.

XI.

THERE WAS NO MISREPRESENTATION IN THE APPLICATION FOR THE POLICY OF 1929 BECAUSE THE ONLY POLICY WHICH THE EVIDENCE REVEALED WAS CANCELLED PRIOR THERETO, HAD BEEN CANCELLED FOR A REASON IMMATERIAL TO THE RISK, AND SO IT WAS NOT NECESSARY TO REFER TO IT IN THE APPLICATION.

We have contended that any misrepresentation to be admissible at the trial of this case should have referred to the policy issued by the appellee company to Dr. Carfagni in 1931. As we have seen, however, the answer "no exceptions" in response to declaration No. 9 of the insurance policy, issued to Dr. Carfagni in June, 1931, was admittedly inserted in the application and the policy by an agent of the appellee company, without at the time consulting Dr. Carfagni or his broker. The appellee company, however, in attempting to avoid liability, was compelled to rely upon an alleged misrepresentation by Mr. Payne when he applied to Miss Hearny for the first policy of insurance issued by the appellee to Dr. Carfagni in May, 1929, two years before the issuance of the policy sued upon herein. We urge that not only was this testimony inadmissible, but even if it were conceded to be true, merely for the purpose of hypothesis, it would still not afford the appellee company a defense to this action.

Miss Hearney, who in 1929 was in the employ of Leo Pockwitz & Company, the general agents of the National Union Indemnity Company, testified at the conclusion of her cross-examination that when Mr. Payne applied, on behalf of Dr. Carfagni, for the first policy of insurance issued by the appellee to Dr.

Carfagni, in 1929, he represented to her that no prior insurance had been cancelled or refused to the applicant. The whole defense of the appellee herein depends upon this one item of testimony, which is positively denied by Mr. Payne, and which is contradicted by the testimony of Mr. Phillip Sullivan, the former general underwriting agent of the appellee, who declared (Tr. pp. 154, 160 and 161) that the employees and agents of the appellee always inserted the words "no exceptions" in response to the declaration referring to the cancellation of prior insurance without making inquiry either of the broker or of the applicant. The preponderance of the evidence shows convincingly that no misrepresentation was made by Mr. Payne to the appellee in May, 1929, at the time application was made for the first policy of insurance to Dr. Carfagni.

But even though, contrary to our contention, the misrepresentations alleged to have been made by Mr. Payne in 1929 were admissible in this action, they would not serve as a defense or justification to the appellee company in seeking to avoid liability upon the policy sued upon herein. *The evidence reveals that the only prior insurance that had been cancelled or refused to Dr. Carfagni within three years prior to the date upon which application was first made in 1929 for insurance for Dr. Carfagni was in connection with a policy cancelled on August 15, 1928, because Dr. Carfagni was a "bad credit risk".* (Plaintiffs' Exhibits 7 and 8; Tr. p. 227.) Insofar as the record reveals, the only other policy which was cancelled on Dr. Carfagni was a policy issued by either

the Washington Underwriters or the Pacific Employees Insurance Co. (Plaintiffs' Exhibits 9 and 10; Tr. pp. 232, 236), which was cancelled on June 11, 1929, *after the time that application was made to the appellee on behalf of Dr. Carfagni in 1929 for the first policy of insurance issued by the appellee to him, and after that first policy was issued by the appellee.* Therefore, at the time that Mr. Payne, on behalf of Dr. Carfagni, first applied to the National Union Indemnity Company in May, 1929, for the policy of insurance which became effective June 1, 1929, no other policy of insurance had been cancelled or refused to Dr. Carfagni, save the policy of the Home Accident Insurance Company, which had been cancelled because of a "bad credit report" on Dr. Carfagni. This was not a cancellation for a reason material to the risk, and under the authorities need not have been mentioned in response to declaration No. 9 of the policy of insurance issued by the appellee. (Tr. p. 31.)

In the case of

Kleiber Co. v. International Insurance Co., 106 Cal. App. 709, 723,

the court considered a policy which contained a warranty that no other insurance had previously been cancelled on the applicant within three years. The evidence revealed that previous insurance had, within three years, been cancelled on the insured for failure to pay premiums. In holding that the insurance company could not successfully avoid liability because of such an alleged misstatement, the court said:

"We cannot see how this could possibly have affected the desirability of this risk, and whether the misstatement in the policy was due to a mistake on the part of the agent or to misinformation given him by Haydis, it was not made by either of the plaintiffs, *was entirely immaterial,* and any facts that were binding upon the plaintiff were known to the agent of the date when the insurance was applied for. Where the cancellation is for a reason not affecting the nature of the risk, it is not material." (Citing cases.) (Italics ours.)

See

Hawley v. Insurance Company, 102 Cal. 651,

in which a prior policy was cancelled for a reason immaterial to the risk, and so it was held that the failure to mention it did not constitute a breach of warranty.

In the case of

Shawnee Life Insurance Company v. Watkins (Okla. 1916), 156 Pac. 181,

the court considered the effect of an application for life insurance containing the answer "No" to each of the following questions:

"Have you ever applied to any agent or company for insurance or for restoration of a lapsed policy of the exact kind and amount applied for?

Has any company or association ever declined or postponed your application for insurance or offered you a policy different to the one applied for?"

The evidence revealed that prior thereto, the assured had applied to the Knights of Pythias for insur-

ance, but had been rejected. The court, after citing numerous cases, held that the assured had not committed a breach of warranty, since a policy in the Knights of Pythias was not contemplated as being within the purview of the question.

In the case of

Fidelity Mutual Life Assn. v. Miller, 92 Fed. 63, 34 C. C. A. 211,

the insured inserted in his application the statement

> "That I have never made application for insurance on my life to any company, association or society."

The court held that this did not refer to an application for insurance in a beneficial order or society, and used the following language:

> "And, besides, while, in their broader sense and acceptance, the words 'company', 'association' or 'society' may cover a beneficial order, it will not be maintained that in ordinary life insurance parlance, they mean any such thing."

In the case of

Phoenix Mutual Life Insurance Co. v. Raddin, 120 U. S. 183, 30 L. Ed. 644:

> "The application for life insurance contained the following successive interrogatories: 'Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the number of policy.' The only answer written opposite this question is '$10,000, Equitable Life Assurance Society'."

The evidence revealed that two other applications for insurance had been made by the assured and declined, but the court held this immaterial since the general object of the interrogatories was to learn the existing amount of prior insurance issued to the assured, instead of the number of prior cancellations, and so imposed liability upon the company.

It is well settled, of course, that a failure to mention the cancellation of previous policies of life insurance does not constitute a breach of warranty in an application for accident or health insurance.

See

Dineen v. General Accident Insurance Company, 110 N. Y. Sup. 344,

in which the application for health insurance contained the statement that

"No application ever made by me for insurance has ever been declined"

when in fact, life insurance had formerly been cancelled or declined on the applicant. It was held that this was immaterial and did not constitute a breach of warranty.

The same decision was rendered upon practically identical facts in the cases of

Wright v. Fraternity Health & Accident Assn. (Me. 1910), 78 Atl. 475, and

Business Men's Assurance Co. v. Campbell, 32 Fed. (2d) 995.

In the case of

Solez v. Zurich Insurance Co., 54 Fed. (2d) 523,

previous insurance had been denied to the applicant for a reason immaterial to the risk, and so it was held that in a subsequent application, the assured was not required to mention it in answer to a question as to whether previous insurance had been rejected or cancelled.

See also,

Capital Fire Insurance Co. v. King (Ark. 1909), 116 S. W. 894.

In the case of

Guaranty Life Insurance Company v. Frumson (Mo. 1921), 236 S. W. 310,

it was found that the assured had withdrawn a prior application for insurance in another company when it appeared that the application would be denied, but before the application had been formally rejected, and it was held that in a subsequent application he did not commit a breach of warranty in warranting that no prior insurance had ever been refused to him.

See also,

Wells v. Great Eastern Casualty Company (R. I. 1917), 100 Atl. 395;

Phoenix Assurance Company v. Coffman (Texas 1895), 32 S. W. 810, and

Liverpool etc. Insurance Co. v. Payton (Ark. 1917), 194 S. W. 503.

In the case of

Mutual Life Insurance Company v. Ford (Texas 1910), 130 S. W. 769,

the evidence showed that the application for a policy of life insurance contained a statement:

> "I am insured in other companies and associations as follows:"

with a space left for the names of the companies or associations in which the applicant was at the time insured. The applicant left the statement blank and failed to include the name of a fraternal organization in which he carried a policy, but it was held that this failure did not constitute a breach of warranty, so as to permit the insurer to avoid liability on the policy.

In all of the foregoing cases, the courts exerted every effort to avoid a forfeiture of the policy in construing the questions with reference to the cancellation or refusal of prior insurance to apply only to such cancellations as were made for reasons material to the risk. In conformity with the familiar rules of construction applicable to contracts of this sort, we submit that the cancellation of a prior policy because of a "bad credit report" on Dr. Carfagni should not be construed as being within the purview of declaration No. 9 in the policy which we here consider, referring to the cancellation or refusal of prior insurance. The record conclusively shows that at the time application was made on behalf of Dr. Carfagni for the first policy of insurance issued to him by the appellee company in May of 1929, the only other policy of insurance which had been cancelled on, or refused to, Dr. Carfagni, was a policy of the Home Accident Insurance Company of Arkansas, and that this policy had been cancelled because of a "bad credit report" on the assured, and not for any reason material to the risk. The National

Union Indemnity Company was protected against any default in the payment of premiums by Dr. Carfagni by the fact that it would not be liable for any indemnity on the risk unless Dr. Carfagni paid his premiums in advance and at the proper times. If Dr. Carfagni ever made default in the payment of his premiums the appellee company could promptly rescind the policy and avoid any liability on the risk. For this court to hold that the cancellation of the Home Accident Insurance policy because of a "bad credit report" was not for a reason material to the risk, it would not have to approach the lengths to which federal courts have gone in those cases holding that an applicant is not required to mention the prior cancellation or refusal of a policy of life insurance in a similar declaration in an application for health insurance. We submit that no misrepresentation was committed by Dr. Carfagni or on his behalf in the instant case by reason of the response "no exceptions" in answer to the question contained in declaration No. 9 referring to the cancellation of prior insurance.

XII.

THE APPELLEE COMPANY, AFTER LEARNING OF FACTS GIVING IT THE ALLEGED RIGHT TO CANCEL THE POLICY OF INSURANCE, DID ACTS CONSISTENT WITH RECOGNIZING THE POLICY AS BEING STILL IN FORCE, AND SO THEREBY LOST WHATEVER RIGHT IT THERETOFORE HAD TO RESCIND.

It will be recalled that in the instant case, the evidence reveals that the insurer had knowledge of the cancellations of prior policies at the time it issued

the policy sued upon herein to Dr. Carfagni on May 13, 1931. The judge of the trial court, in his opinion, said:

> "The evidence in this case shows that the *defendant insurance corporation had knowledge* of the cancellations of the policies issued to Dr. Carfagni by the Home Accident Insurance Company and the American Indemnity Company at the time it issued the policy in suit on May 13, 1931, within the period of three years before the issuance of the policy." (Tr. p. 16.)

We earnestly submit that, irrespective of the rights of *agents* of the appellee to waive provisions of the policy, without written authority from the president or secretary of the appellee, the *insurance company* here, by its conduct, precluded itself from being able to rely upon the alleged breach of warranty, as a defense to this policy. The uncontradicted evidence is that on June 23, 1931, the day after the accident in which Mrs. Eddy was killed, a representative of the appellee insurance company, took Dr. Carfagni's car to Larkin & Co., an automobile repair shop, for the purpose of having the Lincoln sedan automobile restored to good condition, and that an expensive bill was thereby incurred for Dr. Carfagni. (Tr. p. 105.) The appellee, through its agents, indulged in this conduct, even though, according to the decision of the court (Tr. p. 16) and the *findings* herein (Tr. p. 21) the *appellee insurance company* at that time knew of the facts which it now attempts to set up as an alleged breach of warranty. A long and unanimous line of cases in California and elsewhere hold that where an insurer, after learning of

the facts giving it a right to cancel a policy, performs an act consistent with recognizing the validity of the policy, it forfeits its right to thereafter rescind.

In the instant case, too, the uncontradicted evidence shows that after the insurance company knew of the facts giving it a right to rescind, it nevertheless accepted payment of a premium by Dr. Carfagni.

In the case of

Murray v. Home Benefit Life Assn., 90 Cal. 402,

an insurer with knowledge of a breach of warranty, offered to accept an overdue payment of a premium, and it was held that it thereby waived any right to rescind the policy which it previously had.

In the instant case, the uncontradicted evidence further shows that on the day after the accident in which Mrs. Eddy was killed (Tr. p. 104), Dr. Carfagni was required to go to the loss department of the National Union Indemnity Company and to make a report of the accident. The uncontradicted evidence reveals that Dr. Carfagni was required to report his loss, even though the insurance company at the time knew of the alleged facts giving it a right to rescind. The uncontradicted evidence further revealed that, with knowledge of all these facts, the insurance company sent Dr. Carfagni's car to Larkins & Co. for repairs, and that when upon the expiration of a week the repairs were made, and the bill was rendered, the appellee company for the first time denied liability upon the policy and refused to pay the bill of Larkins & Co.

In the case of

Silverberg v. Phoenix Insurance Co., 67 Cal. 36,

an insurer, after the occurrence of a fire loss, learned of facts giving it a right to rescind the policy. The insurance company nevertheless directed the insured to make out proofs of loss, and it was held by the Supreme Court of California that this direction by the insurance company to the insured to make out the proofs of loss, after the insurer knew of facts giving it a right to rescind the contract, operated so as to preclude the insurer from thereafter attempting to cancel the contract.

In the case of

J. Frank & Co. v. New Amsterdam Casualty Co., 175 Cal. 293,

it was held that

> "when an insurance company, with full knowledge of all of the facts, enters into negotiations and relations with the insured, recognizing the continued validity of the policy, the right to a forfeiture for any previous default which may be asserted is waived." (Citing cases.)

In the case of

Sharp v. Scottish Union etc. Co., 136 Cal. 542,

it was held that where an insurance company accepted a premium after knowledge of the facts giving it a right to rescind, the insurance company was thereafter prevented from attempting to rescind the policy.

In the case of

Faris v. American National etc. Co., 44 Cal. App. 48,

the court held that

> "A provision in a life insurance policy that the insurance shall ipso facto cease and determine upon the default of the insured is waived, if the insurance company, after knowledge of default enters into negotiations or transactions with the assured, which recognized the continued validity of the policy and treats it as still in force."

See also the following federal cases holding that if an agent of an insurer, after having notice of facts giving the insurance company a right to avoid liability on a policy, either accepts overdue premiums or performs any other act consistent with recognizing the validity of the policy, his conduct will serve as a waiver of the right of the insurer to set up the facts known to its agent, in avoidance of liability upon the policy.

Knickerbocker v. Norton, 96 U. S. 234; 24 L. Ed. 689;

Aetna Life Insurance Co. v. Smith, 88 Fed. 440;

Cotten v. Fidelity & Casualty Co., 41 Fed. 506;

Phoenix Mutual Life Insurance Co. v. Raddin, 120 U. S. 183;

Tennant v. Travellers' Insurance Co., 31 Fed. 322.

In the case of

Rowsell v. Equitable Aid Union, 13 Fed. 840, it was held that an assessment levied upon a stockholder, after he had defaulted in the payment of a premium due on a policy served to estop the insurer from setting up the default as a defense to liability upon the policy.

We submit that the conduct of the National Union Indemnity Company in the instant case in accepting payment of the premium by Dr. Carfagni, in requiring him to make out proofs of loss and in sending his Lincoln sedan automobile to Larkins & Co. and in incurring a bill therefor, after the insurer itself knew of the cancellation of prior policies, amounted to a recognition that the policy sued upon herein was still in full force and effect and prevented the insurer from subsequently seeking to avoid liability on the ground of any misrepresentation as to the cancellation of prior insurance.

XIII.

ANY AUTHORITIES UPON THE RULE OF FEDERAL JURISDICTIONS REFERRING TO THE EFFECT OF A PROVISION IN A POLICY LIMITING THE AUTHORITY OF AN AGENT TO WAIVE CONDITIONS THEREOF, ARE IMMATERIAL IN THIS CASE.

In his opinion, Judge Kerrigan (Tr. p. 16) declared that if this case had been tried in a state court of California, he would have been required to decide in favor of the appellants. He further stated, however, that under the rule of the federal jurisdictions he was bound by the law as declared therein with respect to the effect of a condition in a policy of insurance providing that a warranty can only be waived by an agent having written authorization from the president or secretary of the insurance company. It is true that there are decisions of the federal courts

which will undoubtedly be urged by the appellee herein upon the attention of this court, holding that if a policy of insurance provides that no agent shall have authority to waive or modify any of its conditions unless with written authority of the president or secretary of the company, a soliciting agent cannot thereafter, orally or by his conduct, bind the company to any waiver of a condition of the policy unless he has the authority in writing referred to in the policy. Such cases are immaterial in the instant case for the following reasons:

1. The record without dispute or gainsay shows conclusively that neither at the time that the policy sued upon herein was applied for or issued, on or about May 13, 1931, nor at the time the second policy was applied for or issued in the year 1930 was any inquiry made of, or any discussion had with, Dr. Carfagni or his broker upon the subject of the cancellation or refusal of prior insurance. It must be conceded that at the time application was made for both the second policy of insurance issued to Dr. Carfagni in 1930 and the third policy, the one sued upon herein, which was issued to him in May, 1931, and at the time of the issuance of each of these policies, the agent of the insurance company inserted the erroneous answers in the applications, without making any inquiry of Dr. Carfagni or his broker and without discussing the subject of the cancellation or refusal of prior insurance with them. The undisputed evidence shows that no misrepresentation was made by Dr. Carfagni or his broker at the time of the application for and issuance of the policy sued

upon herein, nor at the time of the application for and issuance of the prior policy of 1930.

It is the rule not only of the courts of the State of California, but of the federal jurisdiction that when an agent of an insurance company inserts an erroneous answer in a policy, without at the time consulting the insured upon the subject, and without at the time obtaining the false information from the insured, the insurance company is estopped from avoiding liability on the policy by setting up the falsity of any such answer inserted by the agent, even though the policy provides that the agent had no authority to waive or modify a condition thereof without written authorization from an officer of the company. The cases which we have cited herein enunciate the federal rule applicable to a situation when, as here, the agent inserted the erroneous answer in the application, *without at the time consulting the insured or his broker upon the subject, and without at the time obtaining the false information from them.* The difference between the rule of the federal courts and that of the state courts is confined mainly to a case in which the applicant, after being consulted by the agent, misstated facts in his application, which his soliciting agent knew to be untrue. There are some cases in the federal jurisdictions which hold that when an applicant, after being consulted at the time, makes a misstatement to the soliciting agent, which the agent knows to be erroneous, the company will not be held to have waived its right to avoid liability on the policy because of such misrepresentations, when the agent had not conformed with the requirement of the

policy making it necessary for him to obtain written authority in order to bind the company to any waiver or modification of a provision of the policy. And the rule is clearly shown in the decisions of the federal courts and the courts of the State of California, that where an agent, without consulting the insured or without his knowledge, inserts erroneous answers in the application upon which the policy is issued, it will constitute a waiver of the right of the insurance company to avoid liability on the policy because of any misstatement in the application, even though the agent had not conformed with the requirement of the policy that he obtain written authority from an officer of the company before he could effectively waive or modify any condition of the policy. In the instant case, no discussion was ever had with Dr. Carfagni or his broker upon the subject of the cancellation or refusal of prior insurance in connection with the issuance of the policy of 1930 and the one sued upon herein, which was issued in 1931. The evidence is equally clear that no misrepresentation was made by Dr. Carfagni or his broker in connection with the issuance of either of these policies, and that any misrepresentation which the insurance agent inserted in the applications for these two policies was included in them despite the circumstance that no misrepresentation was made by Dr. Carfagni or his agent at the time of their issuance. The only evidence upon the subject of any misrepresentation by Dr. Carfagni is the very slight and highly impeachable evidence of an alleged conversation between Mr. Payne, his broker, and Miss Hearney in connection

with the issuance of the *policy of 1929.* As we have indicated at length elsewhere in this brief, the appellee company herein was not justified, in the issuance of the second and third policies of insurance to Dr. Carfagni in 1930 and 1931, respectively, in filling in his application without consulting him at the time and in exclusive reliance upon an alleged declaration contained in the application for the policy of 1929.

2. The court in its opinion (Tr. p. 16) and in its findings (Tr. pp. 21, 22) declared that *the insurance company itself* knew of the cancellation of prior insurance at the time that it issued its second and third policies of insurance to Dr. Carfagni in 1930 and 1931, respectively. We have elsewhere in this brief also cited cases illustrating the distinction between the knowledge of a soliciting agent and the knowledge of a representative of such importance as to constitute the knowledge of the insurance company itself. In the instant case, the insurance company itself knew at the time it issued the policy sued upon herein, of the facts constituting the alleged breach of warranty, so that any cases referring to an attempt in the policy to limit the authority of a soliciting agent, are immaterial and inconsequential.

3. In the instant case, the alleged waiver concerns a transaction which occurred prior to the issuance of a policy and did not refer to any conditions which were to be maintained after the policy was issued. The waiver here was of that provision of the policy relating to the cancellation or refusal of prior insurance. Consequently any authorities having to do with the

right of an agent to waive conditions which must be performed in the future after the issuance of the policy, where the agent has not the written authority required to be had by him under the terms of the policy in order to bind the insurer, are immaterial in this case.

Mr. Justice Wilbur of this Circuit Court in the case of

Northwestern Nat. Ins. Co. v. McFarlane, 50 Fed. (2d) 539, at page 544,

has aptly drawn the distinction between the effect of the right of a soliciting agent to waive conditions referring to the past as distinguished from his right to waive conditions to be performed in the future, when as here, the agent did not have the authority in writing, which under the terms of the policy he was required to have before he could effectively bind the company to any waiver or modification of any condition of the policy. In his decision, Justice Wilbur declared:

> "The difference between the waiver of a *past transaction* and a *future one* may be illustrated by the situation presented in the case at bar arising from the payment of the first loss. The company paid such a loss under the policy occurring after more than ten days of vacancy. This payment, if made with knowledge of the situation could not be recovered because of such waiver, but it does not follow that because the company was willing to pay a small loss during the period of vacancy beyond that specified in the policy, as the appellee contends, that it was thereby bound to pay a larger loss after a longer period of

vacancy, or that it was thereby estopped from defending a claim made for the destruction of the building by fire, upon the ground that the policy did not cover the loss. *We are not here dealing with the waiver of a past breach of the policy which would invalidate it in the future and leave the property without insurance, unless the waiver was held to estop the Insurance Company from subsequently setting up the very breach it had previously waived,* as in the case of Arnold v. American Ins. Co., 148 Cal. 660, 665, 84 P. 182, 25 L. R. A. (N. S.) 6, cited by appellee, and in Lamberton v. Conn. Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222. *This is not a case where the Insurance Company, by failure to terminate the contract, or declare a forfeiture, continued to enjoy benefits it would not otherwise be entitled to retain, such as was the situation considered by the Supreme Court in Union Mut. L. Ins. Co. v. Wilkinson,* 13 Wall. (80 U. S.) 222, 20 L. Ed. 617, *for the premium paid in the case at bar did not cover periods of vacancy beyond ten days.*" (Italics ours.)

Upon each and all of the foregoing grounds, we urge the inapplicability of any cases which would be confined to the right of a mere soliciting agent to waive or modify a condition of a policy in violation of a provision thereof requiring him to have written authority to do so before he could bind the company itself. The distinction between such a situation and the instant case is so obvious that we do not deem it necessary to reinforce it further.

XIV.

THE JUDGE OF THE TRIAL COURT ERRED IN FINDING THAT ANY INSURANCE COMPANIES, OTHER THAN THE HOME ACCIDENT INSURANCE COMPANY AND THE PACIFIC EMPLOYERS INSURANCE COMPANY, CANCELLED INSURANCE ON DR. CARFAGNI.

In his opinion (Tr. p. 16) the judge of the trial court declared that the "American Indemnity Company" had, within three years prior to May 13, 1931, cancelled a policy of insurance theretofore issued to Dr. Carfagni. In his findings (Tr. pp. 20, 21) he also held that the Travellers Insurance Company, the Washington Underwriters Company and the Western States Insurance Company had cancelled policies of insurance on Dr. Carfagni, within three years prior to May 13, 1931, the date upon which application was made to the appellee on behalf of Dr. Carfagni, for the policy sued upon herein. The record is entirely free of evidence that any policy of insurance was cancelled on Dr. Carfagni within three years prior to May 13, 1931, save the policy of the Home Accident Insurance Company, which was cancelled on October 15, 1928 (Plaintiffs' Exhibits 7 and 8) and the policy of the Pacific Employers Insurance Company (or Washington Underwriters) (Plaintiffs' Exhibits 9 and 10), which was cancelled after the appellee had issued its first policy of insurance to Dr. Carfagni in 1929.

There is not a shred of evidence in the record even referring to the "American Indemnity Company" mentioned in the opinion of the trial judge (Tr. p. 16), and nowhere do we find even a suggestion that

Dr. Carfagni ever had a policy of insurance in a company of that name.

It is, of course, well settled that a policy of insurance can only be cancelled in the manner provided for in the policy itself. Most policies provide for a cancellation by means of a registered letter to the assured.

Insofar as the Travellers Insurance Company is concerned, it is true that Defendant's Exhibit A (Tr. p. 63) shows that a policy was taken out with the Travellers Insurance Company in favor of Dr. Carfagni on August 13, 1928, and that this policy was replaced on September 5, 1928. The evidence utterly fails to show whether any notice of cancellation by registered letter was ever sent to Dr. Carfagni, how any purported cancellation was attempted, or whether the policy was cancelled. It is well settled that if an insurance company, before any liability has accrued, either asks to be let off the risk or requests the insured to replace his insurance elsewhere, the policy is not cancelled.

Baumont v. Commercial Casualty etc. Co. (Mich. 1928), 222 N. W. 100;

Spring etc. Co. v. Parker (Mo. 1927), 289 S. W. 967;

American Fidelity Co. v. Ginsberg (Mich. 1927), 153 N. W. 709.

The only evidence upon the subject as to whether the Travellers Insurance Company policy was cancelled is found in the testimony of Mr. Payne (Tr. p. 80), who definitely and positively stated that the Travellers Insurance Company did *not* cancel the policy. Mr.

Payne further explained (Tr. p. 81) the practice of insurance companies, when they requested to be let off the risk and indicated the distinction between such a replacement and a cancellation. The evidence does not even reveal whether the Travellers Insurance Company ever sent a notice of cancellation of Dr. Carfagni's policy either to Dr. Carfagni or to Mr. Payne by registered letter or otherwise. But even if the record had in some manner indicated that Mr. Payne had received notice by registered mail of the cancellation of the Travellers Insurance Company on Dr. Carfagni, the notice to him would not bind Dr. Carfagni. It has been repeatedly decided that the fact that an agent or broker is authorized to place insurance for the insured does not make him an agent to receive notice of a cancellation of a policy. This rule is explicitly laid down in many decisions.

In the case of

White v. Insurance Co. of New York, 93 Fed. 161,

it was held that

> "the fact that an insurance broker was authorized to procure insurance does not make him the agent of the insured to receive notice of the cancellation of the policies."

In the case of

Kehler v. New Orleans Insurance Co., 23 Fed. 709,

it was held that

> "notice from the company to the broker who procured the policy, of an election to terminate the insurance was not notice to the assured".

See also,

Adams v. The Manufacturers Insurance Co., 17 Fed. 630.

In the case of

Grace v. American Central Insurance Co., 109 U. S. 278, 27 L. Ed. 932,

the Supreme Court of the United States held that the authority of an agent of an insurance broker ceased upon the execution of the policy and

> "subsequent notice to him of its termination by the company was not notice to the insured".

An insurance policy must be cancelled exactly in the manner provided for in the policy. See, for an expression of this elementary rule, the following cases:

Filkins v. State Assurance, 8 Fed. (2d) 389;

Magruder v. U. S., 32 Fed. (2d) 807.

The California rule is expressed in the case of

Cronenwett v. Iowa Underwriters, etc., 44 Cal. App. 571,

in which the following language was used:

> "The fact that an agent is employed to place insurance does not make him an agent to cancel the policy on behalf of the owner of the property."

See also:

Lauman v. Concordia Ins. Co., 50 Cal. App. 609;

Alliance etc. Co. v. Continental Gin Co. (Texas 1926), 285 S. W. 257;

Hartford etc. Co. v. Tewes, 132 Ill. App. 321;

Kinney v. Caledonian Ins. Co., 148 Ill. App. 256;

Waterloo Lumber Co. v. Des Moines Ins. Co. (Ia. 1912), 138 N. W. 504;

Hartford Ins. Co. v. Brothe (Colo. 1927), 262 Pac. 927;

Rose Inn Corporation v. National Union Fire Ins. Co., 232 N. Y. Supp. 351;

National Union Fire Ins. Co. v. Baltimore etc. Co. (Md. 1913), 89 Atl. 408;

Condon v. Exton Hall etc. Co., 142 N. Y. Supp. 548.

Certain it is that the court had no basis for finding that the Travellers Insurance Company had effectively cancelled the policy of insurance on Dr. Carfagni in the manner provided for in the policy, particularly since the uncontradicted testimony of Mr. Payne, the broker, showed that the policy had not been cancelled (Tr. p. 80) but replaced.

The record likewise fails to disclose that the Washington Underwriters Insurance Company or the Western States Insurance Company ever effectively cancelled a policy of insurance on Dr. Carfagni in the manner specified in the policy. Mr. Payne in fact (Tr. p. 62) declared that he received no notice of the cancellation of the policy of the Washington Underwriters. It will be remembered, too, that the Pacific Employers Insurance Company, the Washington Underwriters and the Western States Insurance Company were all companies for which Mullin & Acton were the general agents. Plaintiffs' Exhibits

9 and 10 refer to a policy on Dr. Carfagni, No. 26,543. (Tr. pp. 232, 236.) It will also be recalled that there was some confusion as to whether this policy was in the Pacific Employers Insurance Company or the Western Underwriters. In Defendant's Exhibit A (Tr. p. 63) we see that Dr. Carfagni had a policy bearing the same number, 26,543, in the Western States Insurance Company, which policy had been transferred from the Washington Underwriters Insurance Company. Upon a consideration of the numbers of the policies of the Washington Underwriters and the Western States Insurance Company in Defendant's Exhibit A (Tr. p. 63), their dates of inception, expiration and replacement, it will be observed that these are not separate policies, but only the same single policy of insurance referred to in Plaintiffs' Exhibits 9 and 10. The trial court was only justified in finding, in conformity with the evidence revealed by Plaintiffs' Exhibits 9 and 10, that policy No. 26,543, which had been issued by one of the Mullin & Acton companies on October 5, 1928, had been cancelled in the month of June, 1929. But owing to some slight confusion, the trial court erred in assuming that they were three separate and distinct policies of insurance issued to Dr. Carfagni respectively by the Washington Underwriters, the Western States Insurance Company and the Pacific Employers Insurance Company, and that each of these policies was separately cancelled. In any event, it is clear that the record utterly fails to show that any policy of prior insurance, other than that of the Home Acci-

dent Insurance Company and the Pacific Employers Insurance Company (or the Washington Underwriters) (Plaintiffs' Exhibits 7, 8, 9 and 10) was effectively cancelled on Dr. Carfagni in the manner specified in such policy.

XV.

CONCLUSION.

The statement of the facts of this case, as set forth in the opening paragraphs of this brief, is probably the most effective argument that could be urged in support of the plaintiffs, who are the heirs of Mrs. Marie Eddy, deceased, and who were strangers to the transactions between Dr. Carfagni and the National Union Indemnity Company, concerning the issuance of insurance to him. The judge of the trial court in his decision (Tr. p. 16) declared that

> "If this case were being tried in the California State Court, I should be bound to hold that the issuance of the policy with the knowledge of the prior cancellations constituted a waiver of declaration No. 9 in the policy, and that plaintiffs should recover."

The honorable trial judge thereupon declared that, in his opinion, the rule of the federal jurisdictions differed from that of the state courts, and so considered himself constrained to render judgment in favor of the defendant. Upon the authority of the numerous cases which we have cited in this brief, we urge that, with reference to the situation created by

the facts of this case, the rule of the federal courts and that of the courts of this state are in accord, and that the law compels a reversal of the judgment of the lower court.

Dated, San Francisco,
September 12, 1934.

Respectfully submitted,
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3

No. 7394

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT Z. EDDY, ALBERT P. EDDY, RAYMOND E. EDDY and GLADYS KANE,

Appellants,

vs.

NATIONAL UNION INDEMNITY COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

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BRIEF FOR APPELLEE.

GENERAL STATEMENT OF THE EVIDENCE.

First of all, we wish to refer the court to the findings. These findings should be read as a preliminary to our resumé of the facts.

The defendant, National Union Indemnity Company, was engaged in the automobile insurance business in the City of San Francisco, in the year 1929. It had a general agent by the name of Leo Pockwitz & Co. Upon June 1, 1929, an insurance broker by the name of E. H. Payne applied for full coverage upon a Lincoln automobile owned by Dr. Fred R. Carfagni. The application for this insurance was placed with Leo Pockwitz & Co. as general agent for the defen-

dant. The application was honored by the general agent, which had authority to countersign the policies of the defendant. The policy was issued to the assured and a daily report was sent to the office of the National Union Indemnity Company at San Francisco.

Upon the face of this daily report it appeared that the automobile of the assured had been purchased in October of 1928. There was a discrepancy therefore between the date upon which the automobile was purchased and the effective date of the policy, to-wit: June 1, 1929. One of the assistant underwriters, Mr. Charles Haug, noted this discrepancy and called upon the general agent to inquire as to what the broker who placed the risk had to say about the discrepancy.

The inquiry concerning the discrepancy was made by Mr. Haug to Miss Helen Hearney, in the Automobile Department of the general agent, Leo Pockwitz & Co. Miss Hearney had called Mr. E. H. Payne, the broker, for an explanation. Mr. Payne had told Miss Hearney that the risk was all right "that it had not been cancelled by any other company and that it was in order for me to write it up". (Tr. p. 150.) After verifying this statement and the confirmation by her, Miss Hearney took the word of the broker Payne and reported the conversation to Mr. Haug. After the conversation, Mr. Haug made a blue pencil notation upon the daily report (Plaintiff's Exhibit No. 2) to the effect that "broker says insurance was overlooked, absolutely no claims".

This inquiry related to Declaration 9 of the policy, which was to be used to the effect that no company

has cancelled or refused to issue any kind of automobile insurance for the assured during the three-year period prior to the policy, particularly when there was inserted in the policy the standard phrase "no exceptions".

The first policy of automobile insurance was therefore issued through the agency of Leo Pockwitz & Co. to Dr. Fred R. Carfagni. This policy was delivered to E. H. Payne, the broker. The broker had been engaged in the brokerage business for about twenty-seven years. He had acted as the insurance advisor and broker and general insurance representative of Dr. Fred R. Carfagni for about twelve years. Dr. Carfagni placed the entire management and control of his insurance brokerage business and the selection of risks and the handling of losses and every other matter pertaining to insurance with this particular broker, E. H. Payne.

The first policy expired after one year. A renewal of the policy was made directly between the defendant and the broker. The second policy ran to June 1, 1931. This policy was renewed and a third policy was issued on or about May 13, 1931. All of these policies contained the standard forms of declarations and in each one there were no exceptions to the cancellation or refusal clause. Each of the policies was delivered to the broker, who retained the possession of them for his principal, Dr. Carfagni. Dr. Carfagni at all times had access to the policies which were retained by his broker.

Some minor losses were paid to the assured under the first and second policies. The losses were so minor that renewal was recommended each time. In these losses, Dr. Carfagni was not at fault. However, on or about June 22, 1931, Dr. Carfagni became involved in a very serious accident in which one Mrs. Eddy was killed. This accident was reported to the defendant the following morning after it had occurred. Shortly thereafter, Mr. Jacobus, appellee's Claims Superintendent, met Mr. J. J. Berg, of the Pacific Indemnity Company. They conversed about claims matters in general and Mr. Berg stated that he had witnessed a fatal wreck out near his home. In conversation the name of Dr. Carfagni was mentioned. Mr. Jacobus told Mr. Berg that he was one of the assureds of the defendant. Mr. Berg told Mr. Jacobus that the Old Security Company had cancelled him out as a bad risk. Immediately, Mr. Jacobus proceeded to investigate and caused to be investigated the full background of the assured, and particularly with reference to the history of cancellations.

The investigation conducted by Mr. Jacobus and others disclosed that this particular person had been cancelled out of the Home Accident Company of Arkansas on or about August 15, 1928. He had also been cancelled out by the Travelers Insurance Company on or about September 15, 1928. His policy had also been cancelled out by Western States Company on or about June 11, 1929. These cancellations were called replacements by E. H. Payne, the broker, but upon inquiry from the court he stated that re-

placement and cancellation is the same thing, because when the company elected to cancel the insurance the broker was notified to replace the coverage in some other company. That was the case with most of the cancellations of Dr. Carfagni, except the one case of the Home Accident Company, in which they were required to notify in a formal manner.

Immediately after learning of this information, Mr. Jacobus, upon behalf of the defendant below, rescinded the policy of June 1, 1931, and attempted to tender back the amount owing to Dr. Carfagni under the premium payment made upon that particular policy. Dr. Carfagni prevented the performance of the tender by refusing to accept the registered letter which was sent to him. After this refusal and return of the registered letter, Mr. Jacobus attempted, upon two other occasions, to get the letter into his hands, but was prevented by Dr. Carfagni. Finally the matter was taken up with Messrs. McKenzie & McKenzie, who were the attorneys designated by Dr. Carfagni. The defendant notified the attorneys of Dr. Carfagni that they repudiated all liability and rescinded the contract upon the ground of the breach of warranty upon the part of the assured.

Thereafter, Dr. Carfagni was made a defendant in in the action brought by the heirs of the deceased Mrs. Eddy. All participation in this particular action was refused. The defendant stepped out of the matter entirely after the notice of rescission. Judgment was rendered in that action against Dr. Carfagni; execution, based upon the judgment, was returned unsatis-

fied; the present action was brought under the policy, which was held by the broker Payne for Dr. Carfagni.

The defendant answered the complaint and set forth the breach of warranty No. 9 in the policy to the effect that there were no exceptions to the cancellation or refusal of automobile insurance for the assured during the three years prior to the effective dates of the policy.

With these facts in mind, we shall now proceed to discuss appellants' brief in some detail.

APPELLANTS HAVE MISSTATED THE EVIDENCE, CONFUSED THE ISSUES, AND INCORRECTLY DIGESTED THE AUTHORITIES CITED.

We do not agree with the statement of facts made by appellants. Counsel have forgotten that this appeal is from a judgment based upon findings of fact. Appellants' statement of facts is colored by the injection of argument and by a desire to set forth only evidence which *they* believe to be true. They forget entirely that the trial court has found against them.

Likewise, we cannot accede to appellants' statement of the issues. Here again the findings have been forgotten, the evidence distorted and the issues confused.

Although we propose to reply later in more detail to appellants' brief, a general analysis of that brief at this time will serve as a guide for what is to follow.

The facts as found by the trial court present an entirely different picture from that painted by counsel for appellants.

The statement of issues made by appellants does not contain a correct enumeration of issues for this appeal. Argument and incomplete statements of fact have no place in a statement of issues.

Their elaborate specification of errors for the most part amounts to argument by means of incorrect and incomplete statements from the evidence and by means of erroneous conclusions of law.

On the whole their cases are based upon facts entirely dissimilar to the ones at bar. In many instances the appellants have been guilty of misstating the holding of their cases; and in other instances they have been so careless as to refer us to cases holding in favor of the insurance company upon propositions for which we are here contending. But worst of all, they have tried to anticipate our reply by resort to the well known device of declaring our cases immaterial.

APPELLANTS' STATEMENT OF FACTS IS ERRONEOUS AND IGNORES THE FINDINGS OF THE TRIAL COURT MADE ON CONFLICTING EVIDENCE.

For the convenience of the court, we shall discuss appellants' argument on facts by reference to the page number of appellants' brief, using the abbreviation, (A. Br.).

Appellants say (A. Br. p. 6) the Home Accident Insurance Company policy was cancelled because of a "bad credit report". Finding number III says it was cancelled as a "bad risk". Evidence in support of this finding is to be found at pages 117, 118 (Defendant's "Exhibit B") and at 135 of the transcript.

They state (A. Br. pp. 7-8) that the assured's broker, Payne, made no statement to appellee or its agent concerning prior cancellations. The court found that Mr. Payne *did* make a statement to appellee's agent to the effect that there had been no cancellations. (Finding No. III.) This finding is supported by evidence to be found at the following pages of the transcript: 150, 163, 148. The subsequent renewals were based upon this first representation and Payne knew it. (Tr. pp. 107, 108-109.) The insurance company relied on it in making the subsequent renewals. Payne knew that, too. (Tr. pp. 164, 108.)

At page 10-11 (A. Br.) appellants contend that a custom existed among insurance companies not to inquire about prior cancellations. The actual practice in our case refutes such an argument. The evidence shows good underwriting practice was followed and an inquiry was made of Payne before the policy was written. (Tr. p. 163.)

Mr. Sullivan is mentioned at page 11 (A. Br.) as testifying to the meaning of "no exceptions". He blandly tried to say it means the insurance company lacked further information. However, when the trial court showed astonishment at such contradiction of terms, Mr. Sullivan admitted that it meant just what it said. (Tr. p. 161.)

They rely on the lack of discussion about cancellations on the occasion of the second renewal of the policy in question. (A. Br. pp. 13-14.) However, Payne knew the practice followed; knew the words "no exceptions" would be placed in the third policy;

and read the policy when it was delivered to him. (Tr. pp. 107, 108-109.) After all his trouble getting his principal insured, he wasn't going to tell the appellee anything to jeopardize his chances.

Although wholly immaterial because of the non-waiver provision in the policy, much ado is made about the presence in appellee's files of Credit Clearance Association cards showing two of the many cancellations against the assured. (A. Br. pp. 15-20.) Although this evidence supports the trial court's finding of constructive knowledge to the assured about two cancellations, it is of little value in view of Payne's representations to the company that there had been no cancellations. They are also of no import because they fail to reveal the other cancellations; and because their mere presence cannot be used to predicate a claim of waiver. A search by appellee among its files was rendered unnecessary and it can be presumed that it did not make search. There was no *actual knowledge* shown on the part of anyone connected with the appellee. Mr. Arnberger of the National Union never saw the two cards of the Credit Association (Tr. p. 217), although appellants would infer that he did. (A. Br. p. 20.)

They rely (A. Br. p. 22) on the repair order by a representative of appellee as constituting a recognition of the continued effect of the policy. They failed to prove either knowledge or authority in the representative who directed the car sent to Larkin & Co.

THE SPECIFICATION OF ERRORS BY APPELLANTS IS FULL OF INACCURATE REFERENCES TO THE EVIDENCE AND OF SPECIOUS ARGUMENT.

Appellants have tried to argue this case under the guise of specifying errors. They make inaccurate statements of the evidence. We do not want to burden the court with a detailed refutation of their many misstatements; but some of the more glaring hyperbole and inaccuracies should certainly be answered.

They frequently state that defendant appellee issued its policies knowing of prior cancellations. This is not even a half truth. There was constructive knowledge of 2 cancellations and no knowledge whatever of 2 others.

(Specification No. 3.) Payment of small losses on assured's policies by a claims man of limited authority and without any knowledge imputable to him either actually or constructively certainly could not work a waiver of a warranty in the policy.

(Specification No. 4.) They say Carfagni made no statement about cancellations. The evidence shows his agent, Payne, did so. The assured adopted it as his statement upon retention of the policies through his agent.

(Specification No. 5.) They do not state the truth because appellee did not know of all cancellations.

(Specification No. 6.) It is not true that the Home policy was cancelled because of a "bad credit report". We shall later refer to the record, showing it was because Carfagni was a bad risk.

(Specifications Nos. 7, 8 and 9.) The issue of cancellation by the Travelers was made at the trial without objection and existed in the pleadings. (Tr. pp. 12-14, 10-11.) (Paragraph III and IV of Answer.) The evidence of these cancellations has already been pointed out.

(Specification No. 10.) Evidence of false representations by Carfagni's agent exists in abundance. The extent of appellee's knowledge is grossly exaggerated.

(Specification No. 11.) The argument that appellee issued its third policy based entirely on its own experience is absurd. The record is full of evidence that reference was made to the original schedule of declarations and that reliance was placed on Payne's assurances to Miss Hearney. There was really not any need for inquiring of Payne after the 1929 inquiry, because at that time Payne said Carfagni had not been cancelled out by any company, and certainly the appellee could rely on that as being true in May, *1931,* since appellee certainly had not cancelled Carfagni up to that time.

(Specification No. 12.) If this was error it was not harmful to appellants. However, appellants' own witness supplied the evidence about the Pacific Employers Insurance Company cancellation. (Tr. pp. 227, 230-231.)

(Specifications Nos. 13, 14, 15, 16, 17.) These will be fully answered by our references to the record in support of the findings.

(Specification No. 18.) Reliance on an order to have the car sent to Larkin Co. is of no avail. There

was no evidence as to who authorized it nor of the authority of the unnamed person in so ordering it; nor of that person's knowledge concerning a breach of warranty. The only evidence on the subject was conflicting. (Tr. pp. 105, 189.)

(Specifications Nos. 19, 20, 21, 22.) These are general specifications. No evidence is pointed out to support them. If there were such evidence, it was conflicting and the trial court resolved the conflict in favor of appellee.

(Specifications Nos. 23, 24, 25, 26, 27.) Rejection of appellant's proposed findings is complained of. The findings do not adhere to the facts. (Tr. pp. 117-118, 135-136, 149-150, 162-163, 202-203, 228-233, 217, 148, 163, 107-109, 164.) They are based in part on conflicting evidence and the trial court found the other way. Some of these proposed findings were immaterial and the one about the tender of premium was not an issue, any defect having been waived by Carfagni. (Tr. pp. 180, 182, 175, 176.)

(Specification No. 28.) This finding re the policy coverage was wholly unnecessary to the decision.

(Specification No. 29.) This specification serves to show the fallacy of their charge of estoppel. Carfagni believed he was insured with appellee all right; but what he hoped was that appellee would never find out about his previous insurance record. He was not relying on the insurance company to keep him insured regardless of cancellations. He didn't know one way or the other about the company's purported knowledge. His agent, Payne, however, had strong reason

for suspecting that appellee didn't know about the cancellations and to hope that appellee would never find out. What Carfagni and Payne were really relying on was their misrepresentation to Miss Hearney (appellee's underwriting agent) and on their own discreet silence concerning the past.

(Specification No. 30.) Appellants object to the introduction in evidence of Defendant's "Exhibit B", showing the facts of the Home Fire & Accident Insurance Company's cancellation and the reasons therefor. They do not now support this objection with any authorities, obviously because it was clearly admissible.

(Specification No. 31.) Objection was made to testimony by appellee's underwriter, Arnberger, the only man whose knowledge of prior cancellations could have any bearing on the question of waiver. Mr. Arnberger said he never saw the I. C. C. A. cards showing cancellations by the Home and the Pacific Employers. This evidence tended to defeat any supposition of actual knowledge from the mere existence of the cards in appellee's files. Therefore, it was very material to the point of waiver.

(Specifications Nos. 32, 34.) These are general specifications against the decision made as a whole.

(Specification No. 33.) Here the appellant attempts to use the memorandum opinion of the trial court as a conclusion of law. This use of the opinion is not permitted.

THERE CAN BE BUT TWO ISSUES ON THIS APPEAL; YET APPELLANTS ARGUE ON NINE ISSUES OF DISPUTED FACTS.

Although there are some thirty-four specifications of error in their brief, only the nine so-called issues are discussed by reference to authorities.

The findings, the facts, and the law are all against them and serve as a complete answer to their nine questions as to the issues. For example, No. 7 of their issues is contrary to the finding. (Evidence at pp. 117, 118 and 135.) Their issue No. 8 deals with the question of rescission. Where a policy is void because of a false warranty, the question of a right to rescind is unimportant. Rescission is not the sole remedy.

However, the sole issues before this court on an appeal of this kind are:

1. Are the findings supported by any substantial evidence?

2. Were the conclusions of the trial court correct in law under those findings?

In Section V of their brief appellants seek to inject the issue of fraud into this case. That has never been an issue. The evidence and the proof was of a misrepresentation, a concealment, and a false warranty. The false warranty is the principal ground for the trial court's decision. Proof of any one of the above circumstances would have sufficed to defeat the claim. Moreover, the question of proof was resolved in favor of the appellee by the trial court.

THE APPELLANTS' ARGUMENT IS WEAKENED BY THE CASES THEY CITE. EXCEPT FOR CASES MISCONSTRUED AND MISREAD BY APPELLANTS, THERE ARE NO ANALOGOUS FACTS CONTAINED IN ANY OF THEM.

With the findings of the trial court and the limited issues in mind, we turn to a discussion of the points made by appellants commencing on page 51 of their brief. Our remarks under this heading shall be confined to a brief criticism of the arguments advanced and of the cases used by appellants.

A. ALTHOUGH A MISREPRESENTATION WAS NOT ESSENTIAL TO SUPPORT A DEFENSE OF FALSE WARRANTY; YET THE RENEWAL POLICY WAS GRANTED ON THE STRENGTH OF A MISREPRESENTATION.

Under Section VII appellants say the policy sued on is a separate contract and unrelated to the policy of 1929. They forget, however, that the third policy was simply a renewal of the original and that it was based upon the statements and representations made by Carfagni's agent in 1929. Appellants' case of *Kentucky Vermillion Co. v. Norwich Ins. Co.,* 146 Fed. 695, is a case upon which we rely in support of our position on the question of warranties and their waiver. It does not eliminate prior representations and statements from consideration under the renewal policy.

Danvers Bank v. National Surety Co., 166 Fed. 671, merely holds (p. 673) that the insurer is not limited to the original application, but may also rely on statements made in the renewal application. Counsel misstate the ruling of the court.

basis. In the other group we have the assured telling the facts to the company's agent and the agent then construes those facts in his own way and puts down an answer that he thinks is proper, although it may not accruately translate the assured's statement. In these cases, even though the assured sees the answer that is made by the agent, he is held entitled to rely on the agent's interpretation and assurance that such an answer is the proper one under the facts. In most of these cases in both groups the question of waiver is not involved at all. Another group of cases is decidedly favorable to appellee, and the rulings were evidently misconstrued by appellants. Then there is a group of miscellaneous cases which we shall deal with separately.

The following cases to be found under Section VIII of appellants' brief deal with facts wholly dissimilar from ours:

First, because our case is primarily concerned with a breach of warranty.

Second, because under the misrepresentation phase of our case the only statement made by assured was false, whereas in the cases hereunder listed the assured told the facts to the agent and relied on the agent's correctly transcribing the information, who, without assured's knowledge, does not do so.

In many of these cases the answers were not proven false; there was not a non-waiver clause in the policy or waiver was not involved.

Menk v. Home Insurance Co., 76 Cal. 50;
Lyon v. United Moderns, 148 Cal. 470;

Schwartz v. Royal Neighbors, 12 Cal. App. 595;
Putnam v. Commonwealth Ins. Co., 4 Fed. 753;
Fireman's Fund v. Norwood, 69 Fed. 71;
American Life Ins. Co. v. Mahone, 88 U. S. 152.

The following group of cases cited by appellant under Section VIII of their brief concerns the truthful statement by assured to an agent who puts his own interpretation upon it and fills in the answer according to his interpretation.

Pacific Employer Co. v. Arenbrust, 85 Cal. App. 263, 266;
American Building Maintenance Co. v. Indemnity Ins. Co. (erroneously referred to as *California Building Maintenance Co. v. Indemnity Ins. Co.,*) 214 Cal. 608;
Parrish v. Rosebud, 140 Cal. 635;
Phoenix Ins. Co. v. Warttemberg, 79 Fed. 245;
Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. Ed. 341;
Bank etc. Co. v. Butler, 38 Fed. (2d.) 972.

The following cases cited by appellants deal with facts slightly different from those in the above two groups, and for that reason we shall discuss them separately:

In *Dunne v. Phoenix Ins. Co.,* cited on page 60 of appellants' brief, a warehouse company took out insurance on the goods without assured's knowledge. The question of title was involved, and the court declared that this question did not affect the risk. Neither assured nor his agents saw the policy and did not know what statement of title had been made therein.

In *Sam Wong v. Stuyvesant Ins. Co.* (A. Br. p. 61) there had been no representation by the plaintiff whatever, nor any application signed. No inquiry was made by the company. To top off all this, the court found that *the warranties* were true.

In *Hutchings v. Southwest Auto Ins. Co.* (A. Br. p. 61) there was no question and answer involved. There was a covenant in the policy that the car was registered at Sacramento. Contrary to counsel's statement, the evidence didn't show who had the policy. Contrary to appellants' statement on the case, there was no insertion by an agent of anything at all.

On page 62 of appellants' brief a group of cases are cited as dealing with the insertion of statements by the company agent *without consulting the assured.* This is not correct. The first of these cases, *American Building Maintenance Co. v. Indemnity Ins. Co.,* (erroneously referred to as *California Building Maintenance Co. v. Indemnity Ins. Co.,*) 214 Cal. 608, merely dealt with the construction of the terms of the policy as to whether or not it covered elevators. At page 618 the court held against the estoppel theory, saying:

> "We do not think the doctrine of estoppel is applicable. It is to be noted that the claimed estoppel is based not upon an affirmative act on the part of the plaintiff corporation but upon silence or acquiescence. There is an entire absence of knowledge on the part of the plaintiff as to the facts upon which the estoppel rests and an entire absence of any wilfulness or culpability in the silence of the plaintiff. In *Weintraub v.*

> *Weingart,* 98 Cal. App. 690, 701 (277 Pac. 752), it was held that estoppel requires knowledge on the part of the person claimed to be estopped of the facts upon which the estoppel depends, and in *Lencioni v. Fidelity Trust & Sav. Bank,* 95 Cal. App. 490, 498 (273 Pac. 103, 106), the court held, 'In estoppel, there must be something wilful and culpable in the silence which allows another to place himself in an unfavorable position on the faith or understanding of a fact which the person remaining silent can contradict.' "

In *McElroy v. British American Assurance Co.,* 94 Fed. 990 (9th Circuit) (A. Br. p. 63), the sole question was whether plaintiff had a right to have his case go to the jury. A nonsuit was reversed. Again we have a case where the plaintiff concealed nothing and the agent of the company had actual knowledge of all the facts. The company's agent was not shown to have been restricted in authority in any way. (p. 995.) On the question of possession of the policy, the court said the plaintiff was entitled to assume the agent had put in the information correctly and in accord with the information given. (p. 1000.) The provision against waiver did not restrict the powers of the agent. The court indicated parol evidence could be used to show that the policy did not contain the intention of the parties due to accident, mistake, or fraud. The parol evidence may be used to show the policy was void—not to vary its terms. The use of parol evidence was limited by the dictum of the court to explain or to show the answer given by the assured was different from that shown in the policy. That case can be no authority under the facts in our case.

McMaster v. N. Y. Life Ins. Co., 183 U. S. 25, 46 L. Ed. 64, is incorrectly briefed by appellants. The agent did not insert an erroneous warranty. He put in the application a request to date the policy the same as the application, without assured's knowledge. This had the effect of making a premium due earlier. The agent told plaintiff that the policy would be effective when the first premium was paid and assured relied on this in paying the subsequent premium. The agent told assured upon delivery of the policy that it was made out as requested, insuring for thirteen months without additional premium. This was not true, but assured relied on it and didn't read the policy. Dictum by the court was to the effect that the assured had the right to rely on the agent's representation and on the fact that the policy was in accord with his application when it left his hands. (46 L. Ed. 64.) In the end, the court construed the policy to give effect to the one month of grace provision, so that payments of the first premium made the policy nonforfeitable for thirteen months.

In *Rapides Club v. American Union Ins. Co.,* 35 Fed. (2d) 253 (A. Br. p. 65), unlike our case, the suit was to reform the policy. The plaintiff told the company agent the truth about the incumbrance on the property, but the policy was written with a mortgage forfeiture clause. The court simply followed the *McElroy* case, and said on the question of reformation, the evidence showed that the parties had intended to insure without the mortgage forfeiture clause.

Palatine Ins. Co. v. McElroy, 100 Fed. 391, is the same as *McElroy v. British etc.* in 94 Fed. 990.

Knickerbocker v. Norton, 96 U. S. 234, 24 L. Ed. 689, was a case where the home office of the insurance company had on many occasions let its agents take notes instead of cash for premiums. The company received the notes without protest. It also ratified the acts of its agents in permitting extensions of time on the notes. Also, the company let plaintiff know it would not insist on a forfeiture by taking notes and by agreeing to extend the time. No waiver was involved. The question was one of ratification and estoppel, with all the necessary elements of estoppel present.

In *Union Mutual Co. v. Wilkinson,* 80 U. S. 222, 20 L. Ed. 617, a representation was made by some person other than the assured, without assured's knowledge. The agent accepted the third party's statement of the facts. It was not, as appellants say, a question of erroneous warranties. The question was solely one of representations, and since neither assured nor his agent made any such representations, the defense fell on that point. The question of waiver was not involved. Parol evidence was allowed to show it had not been the assured's representation—permitting parol in case of accident, mistake or fraud.

In *Continental Life Ins. Co. v. Chamberlain,* 132 U. S. 304, 33 L. Ed. 341, again appears the fact that the agent assured the plaintiff that co-operative societies were not considered in the question of "other insurance". Assured told the agent of his membership in

the Society, but the agent wrote in the answer "no other". The case was decided under an Iowa Statute, making the agent an agent of the insurer and not of the insured. As usual, appellants try to make this court think that the Supreme Court has refused to give effect to the non-waiver clause by quoting such a clause from the policy in that case. On the contrary, the Supreme Court simply interpreted the answer "no other" in light of the understanding of the parties and not as a change of the policy terms.

C. APPELLANTS' AUTHORITIES ON WAIVER CANNOT BE MADE APPLICABLE HERE BY THE DEVICE OF DISTORTING THE FINDINGS.

Section IX of appellants' brief is simply a continuation of the discussion on waiver and estoppel by the company. Here we find appellants trying to distort the findings into something wholly foreign, both to the findings and to the evidence. They say "*the appellee insurance company itself*" knew of the prior cancellations. It is significant that they do not refer this court to any evidence in support of such an assertion. The findings cannot be so distorted as to divorce them entirely from the evidence. Possession of cards in its files showing at most only a *constructive* knowledge of only two cancellations is the most that can be said as to the company's knowledge.

The authorities relied upon by appellants again fall into definite groups. Under this section of their brief, we find many incorrect references to the decisions.

In the following cases the question involved was the waiver of late payment of premium by acceptance of

the premium at the home office, or ratification in the same manner or by custom.

Aetna Life v. Smith, (A. Br. p. 74);
Tennant v. Travellers Ins. Co. (A. Br. p. 78);
Mutual Reserve Fund v. Cleveland Woolen Mills, 82 Fed. 508;
Phoenix Mutual v. Doster (A. Br. p. 81);
Aetna Life v. Smith (A. Br. p. 86);
Loveland v. U. S., 18 Fed. (2d) 585.

Appellants have the temerity to suggest that Mr. Sullivan's testimony about a "custom" to issue policies without inquiry of assured concerning cancellations can overcome or displace positive testimony to the contrary in the particular instance of Carfagni's policy. What was *actually* done is the important thing. Inquiry *was* made. Even the so-called custom not to inquire wouldn't effect the case where the policy was delivered to the assured's agent, and the assured's agent said he read it and knew the warranty was there. This is obviously an effort of appellants to twist the testimony about "custom" in this case into some semblance of an analogy to cases dealing with customary acceptance of overdue permiums. The evidence in our case shows that the agents of the company were in fact "on their toes" by making inquiry from assured on the question of cancellations as soon as they saw a discrepancy between the date of purchase of the automobile and the date of application for insurance.

Again at pages 94-95, appellants indulge in gymnastics in an effort to make evidence of a custom

control what actually happened. They also try to get this court to believe a witness on a question of conflicting testimony. Mr. Sullivan tried unsuccessfully to give an absurd interpretation at the trial of the words "no exceptions". He finally broke down, however, and admitted that it meant that there had been no prior cancellations. (Tr. p. 161.)

These next cases deal with truthful answers by the assured and the agent assures him that the agent's way of answering is correct:

Hanover Fire Ins. Co. v. Dallavo, 274 Fed. 258, 261, 262;

Standard Life v. Fraser, 76 Fed. 705 (A. Br. p. 80);

Lueder's Executors v. Hartford (A. Br. p. 92);

Langdon v. Union Mutual (A. Br. p. 93).

The next group of cases concerns many different situations, and the facts are in many instances incorrectly related by appellants. We discuss these cases separately, merely to point out their individual differences.

Starting with *Aetna Life Ins. Co. v. Frierson,* 114 Fed. 56 (A. Br. p. 71), appellants again supply us with a case where the assured tells the insurance company the truth and the company issues a policy. A letter to the home office by the assured told them of his contemplated trip which would otherwise have violated the policy. The court held the letter was a part of the application, and hence the truth had been told. Appellants falsely tell us (A. Br. p. 72) that the application contained no reference to a journey.

The court distinctly said at page 61 that the question of a waiver was not involved. The home office of appellee was never involved in the case at bar.

Continental Insurance Co. v. Fortner (A. Br. p. 75) dealt with waiver of proofs of loss after a loss occurred by reason of the company's denial of liability.

In *Diebold v. Phoenix Ins. Co.,* 33 Fed. 807, there was absolutely no statement made by assured in the application as to ownership, but the application showed he did not have the title in fee. This was true, and the company contracted on that basis.

Appellants misstate the facts from *Phoenix Mutual Life Ins. Co. v. Raddin,* 120 U. S. 183, 30 L. Ed. 644. (A. Br. p. 77.) The application did not misstate the assured's habits. His habits changed after the policy was written. Nor was the question of a breach of warranty involved. The sole issue was as to the representations by the assured. Out of four questions asked in the application, the assured answered only one and he answered it truthfully. The company accepted the incomplete answer and the court held they could not later object. There was no non-waiver provision mentioned. Appellants try to mislead by saying that the court upheld a certain quoted instruction (A. Br. p. 77) on the question of waiver. Appellants neglect to tell the court that the reason the instruction was not declared erroneous was on the ground that there had been no evidence of any waiver and the instruction was, therefore, inapplicable and harmless. Whether the company had any knowledge or not was not shown.

Thomas v. Charles Baker & Co., 60 Fed. (2d) 1057, had to do merely with a recital in the policy of receipt of the premium as estopping the company to deny that fact. The quotation by appellants of the non-waiver clause in that case is mere camouflage.

Firemen's Fund Ins. Co. v. Globe Navigation Co., 236 Fed. 618, involved a marine policy. The company knew of the leaks in the ship. There was no concealment of the leaks by assured. There was not any non-waiver clause. The court held the defense of unseaworthiness came too late.

New York Life Insurance Co. v. Eggleston, 96 U. S. 572, 24 L. Ed. 841, held the company itself had to ratify the agent's acts in waiving. (p. 843.) The company failed to notify assured as to where he should pay his premium, so they couldn't rely on non-payment. There was no question of waiver under such circumstances.

The case of *Sawyer v. Equitable Accident Ins. Co.* (A. Br. pp. 92-93), involved facts inserted in the application after the applicant had signed and without his knowledge. The application was not made a part of the policy.

In *Loring v. Dutchess Ins. Co.,* 1 Cal. App. 186, the truth was told by assured and the policy was payable to two persons as their interest may appear. The sole ownership clause was, therefore, held inapplicable.

In *Breedlove v. Norwich Ins. Society,* 124 Cal. 164, full and truthful information was given the company

before the policy was issued. At page 167 the court upheld the finding that a warranty was never given.

In *Bayley v. Employers Co.,* 125 Cal. 345, no answer was made as to prior payments on accident insurance. The general agent had actual knowledge of prior payments and the assured knew he knew it. The court said the question would be different and it would have favored the company had the question been answered "none other".

The following cases cited by appellants are favorable to our position:

Appellants' case of *Wheaton v. North British Co.,* 76 Cal. 415, rules for the insurance company. That case is a good one on the question of waiver and estoppel. It likewise distinguishes certain cases relied on by appellants from cases dealing with facts like those at bar. Verdict for plaintiff was reversed. In ruling, the court said:

> "The witness Heacock testified that the plaintiff did, in fact, read the application and questions attached before signing them. If the jury believed such testimony, it was evidence tending to show that the plaintiff had knowledge of the answer valuing the insured property at eighteen hundred dollars; that he approved of the statement, and by ratification recognized Heacock as his agent in preparing the application. If he did, with knowledge of the contents of the application, sign it, he was bound by the statements contained in it."
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> * * * * * * *
>
> "The class of cases referred to is very different from that in which the policy provides that there

can be no waiver except in writing indorsed on the policy. In the last case, the mode enters into and is a part of the power; the insured has full notice when he enters into the contract that a condition cannot be waived by an agent to whom the provision as to written indorsement relates, except in the manner in the contract provided."

"There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known."

* * * * * * *

"And the facts proved must be such that an estoppel is clearly deducible from them. Estoppels are not favored. (*Franklin Co. v. Merida*, 35 Cal. 558.)"

* * * * * * *

"From the circumstances assumed in the instruction, the agent of the defendant was not bound to know as a fact that there had been a breach of the condition. He may have believed no fraud, although he accepted as true the statements contained in the reports of his subordinates; even if those reports aroused his suspicions, he may, as a prudent and reasonable man, have reserved the matter for further investigation. *He was not estopped, as having knowledge of a fact, because another fact was brought to his attention which might have excited his suspicion, or even if the fact of which he had notice ought to have put him upon inquiry.* The appropriate time for investigation as to breaches of warranty or falsity of representation is when application is made for payment of a claim, and presentation of the proofs." (Italics ours.)

St. Paul Fire and Marine Insurance Co. v. Ruddy, 299 Fed. 189. This case was very carelessly read by appellants. It holds for the insurance company. Counsel for appellants quote from the policy that it would be void "if the interest of insured be other than unconditional", but they fail to note the language "unless otherwise provided". The court found for the insurance company and said there was no waiver. Its language is particularly illuminating in support of our position on this appeal.

> "There was nothing to mislead him, or that he could complain of. It is entirely dissimilar to a situation where, after there has been a breach of warranty, a company receives a premium, knowing of such breach."
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> * * * * * * *
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> "Here the company, it is true, had notice of the transfer; but they did nothing to induce Ruddy to believe that the insurance would apply any differently from the provisions of the contract."
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> * * * * * * *
>
> "It is said in argument that the law does not favor technical defenses; that policies should be construed liberally; that forfeitures are not favored—all of which may be accepted as true, but in order to avoid forfeitures courts cannot do violence to contractual obligations. The unfortunate position of Mr. Ruddy has been brought about by his own carelessness in not acquainting himself with the terms of the policy at the time he bought the property."

In *Globe Mutual Life Insurance Co. v. Wolff,* 95 U. S. 326, 24 L. Ed. 387, cited by appellants, the court

limited a waiver and estoppel to cases where fraud or injustice would be worked on the assured. The court said the assured could not conceal facts from the company and then claim a waiver. The case is decidedly in favor of our position in the case at bar. The court would not presume that an agent with knowledge of a breach has informed the company of it. On the question of non-payment of premiums, the court pointed out that the company had ratified its agent's acts in taking late premiums at the home office. The policy said an agent couldn't waive its terms, but didn't limit the *manner* of waiver. No requirement existed as to an endorsement in writing attached to the policy and signed by an officer of the company. The limit on the authority of its agents was nullified by the actual powers given them, and since there was no limit on *how* a waiver could be effected, the court said late payment of premiums was waived by acceptance of them at the home office. This amounted to a ratification. This didn't have to be in writing nor attached to the policy. The language of the decision is so definitely in our favor that we quote from pages 389 and 390, as follows:

> "But, even if the agent knew the fact of residence within the accepted period, he could not waive the forfeiture thus incurred, without authority from the Company. The policy declared that he was not authorized to waive forfeitures; and to the provision effect must be given, except so far as the subsequent acts of the Company permitted it to be disregarded. There is no evidence that the Company in any way, directly or indirectly, sanctioned a disregard of the pro-

vision with reference to any forfeitures, except such as occurred from non-payment of premiums."

* * * * * * *

"It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the Company of any circumstances coming to his knowledge affecting its liability; and, if subsequently the premiums are received by the Company without objection, any forfeiture incurred will be presumed to be waived. But here there was no ground for any inference of this kind from the subsequent action or silence of the Company. There was no evidence of a disregard of the condition as to the residence of the assured in any previous year, and, consequently, there could be no inference of a waiver of its breach from a subsequent retention of the premium paid. This is a case where immediate enforcement of the forfeiture incurred was directed, when information was received that the condition of the policy in that respect had been broken."

* * * * * * *

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the Company sought to be estopped from denying the waiver claimed

> should be apprised of all the facts: of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the Company an important fact, like that of the insured being *in extremis,* and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the Company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy holder, instead of protecting him against the commission of one by the Company."

The above language serves to clarify our position that appellants' cases are all distinguishable on their facts.

We are at a loss to understand counsel's reference to *Allen v. Home Insurance Company,* 133 Cal. 29, 33. (A. Br. p. 93.) The holding is not as stated by appellants. In that case the plaintiff gave the true facts to the company. He didn't know it was a bawdy house. A verdict for plaintiff was reversed. The court held that the fact that plaintiff didn't know it was a bawdy house was no excuse. The liability of the company was limited by the terms of the policy.

Appellants say at page 96 of their brief that the appellee induced Mr. Payne to believe that it would not attempt to declare a forfeiture by reason of any misrepresentation in the schedule of declarations. We fail to see how Mr. Payne was induced to believe such

a thing. Mr. Payne knew very well that four companies had cancelled because Carfagni was an undesirable risk. He hoped appellee wouldn't find that out. Why, Mr. Payne didn't rely on anything except his own false and fraudulent representation! There isn't a scrap of evidence to support any statement that Payne thought appellee was keeping Carfagni insured just because it liked him and in disregard of Carfagni's record, about which appellee knew nothing.

D. APPELLANTS CANNOT NOW FOR THE FIRST TIME RELY ON A POINT NOT MADE TO THE TRIAL COURT. SECTION 633d OF THE POLITICAL CODE IS INAPPLICABLE.

Section X of appellants' brief deals in part with the effect of Section 633d of the *California Political Code*. The argument presented under this section is that Section 633d prevents the insurance company from saying what agents can waive provisions of a policy and from saying how any waiver of policy provisions can be made by such designated agents. It is only necessary to read Section 633d of the *California Political Code* to see the fallacy of appellants' contention and to realize that the section has no such effect. We find this novel argument advanced for the first time by appellants in their brief. It was apparently dug up in a desperate effort to defeat the effect of the non-waiver provision of the policy.

Examination of the code section reveals that it simply requires foreign insurance companies to write or place its insurance policies in this State through an agent of the company "*residing in this state*" and such agent "shall countersign all such policies". Now

in our particular case G. M. Roloson was the countersigning agent on Carfagni's policy. (Tr. p. 32.) In light of our subsequent discussion, it is well to note that G. M. Roloson does not figure in any of the testimony nor in any of the evidence save and except that his name appears on the policy in question as the countersigning agent. If we assume or admit, for the sake of argument, that Roloson was a general agent by force of Section 633d and by reason of the fact that his name appears as the countersigning agent, it is impossible to see how appellants can make anything out of *that*. Appellants cite cases where a general agent acquires knowledge and this knowledge is imputed to the company despite policy limitations. There was no evidence in our case that *any* person connected with appellee had any knowledge about Carfagni's insurance history, least of all Roloson. Cases imputing the knowledge of a general agent to the company do so on the theory that the general powers given such an agent nullify or abrogate the policy provisions saying no agent's knowledge can be imputed to the company.

In addition, there is a total failure of compliance with that other provision of the policy, to which the parties agreed, as to *how* waivers of its provisions are to be made, viz., by writing signed by the president or secretary and attached to the policy. Appellants can't, and don't, argue that Section 633d affects that requirement in any way.

Before discussing their cases dealing with the powers of an agent, we wish to comment on the fact

that appellants have not cited a single California case interpreting Section 633d of the *California Political Code.* This section has been in effect ever since 1923.

The case of *Bank v. Butler,* 38 Fed. (2d) 972, dealt with a Missouri statute not at all like the California section relied on by appellants. The Missouri statute merely made a soliciting agent the insurer's agent instead of the assured's agent. We have already discussed the facts of the case as indicating a full disclosure by the assured, with the general agent putting his own interpretation on those facts. No notice of any limit on the agent's authority was brought to assured's notice.

Thelen v. Metropolitan Life Ins. Co., 2 Fed. Supp. 404, simply illustrates how the Missouri statute makes the soliciting agent a general agent, so that his powers will be commensurate with his title and unrestricted by the policy provisions. A demurrer was sustained in that case, so that the court's language on waiver was a dictum. The case does not hold, therefore, that the statute modifies any provision of the policy. Nor does it hold that the statute eliminates the need for proof of waiver in the manner specified by the policy.

In the case of *Bank of Brunson v. Aetna,* 203 Fed. 810, a South Carolina statute made the soliciting agent the agent of insurer. The court held a directed verdict was error. There was evidence of broad powers in the agent. *The court didn't think the statute itself could make a mere soliciting agent into a general agent with power to waive policy provisions.* (p. 813.) It

is apparent, also, that our opponents have again misstated the ruling of the case. There was no evidence whatever of any limitation of authority in the policy. And the court merely stated that the statute raised a rebuttable presumption of a general agency. (p. 815.)

Continental Ins. Co. v. Chamberlain (A. Br. p. 102), has already been discussed. It is now referred to by appellants in connection with the Iowa statute therein discussed. The Iowa statute, like the ones in Missouri and South Carolina, simply made a soliciting agent the insurer's agent. As far as being any authority for the point that the statute modifies nonwaiver provisions, it is not in point. The court said no waiver of policy terms was involved.

At page 103 appellants say that because Section 633d of the *California Political Code* says no policy can be issued until a local agent has countersigned it, the section makes the agent's knowledge attributable to the company regardless of the policy limitation—"by a parity of reasoning with the foregoing decisions of the Supreme Court of the United States", they say. They do not show how there is any "parity of reasoning". The statutes in the cases are not at all similar to the *California Political Code* section. Moreover the cases do not hold for the proposition stated by appellants.

The facts in *Diebold v. Phoenix Ins. Co.,* 33 Fed. 807, are not in accord with the statement in appellants' brief that the application contained a misstatement. The application had a true statement to the effect that title in fee was not held by assured.

At page 104 of appellants' brief is cited the case of *Stipcich v. Metropolitan Life Ins. Co.,* 277 U. S. 311, 72 L. Ed. 895. There the assured told the company agent that he had developed ulcers. This information was not communicated to the company. The policy said any statements to its agents should not be considered as having been made to the company unless stated in part A or B of the application. It was shown that the application was not possessed by nor available to either the assured or the agent. It was therefore made impossible to put the information in part A or B. There was no question of waiver, as the assured had done all he could in telling the company agent. The limitation in the policy on the communication of statements to the company would be given effect, said the court, so far as possible to be done. At page 900 of the opinion appears language clearly distinguishing the case from the instant case. There again was an Oregon statute making the soliciting agent insurer's agent. This was simply construed as making the solicitor the authorized agent of the company. As already stated, no question of waiver or of a power to waive was actually involved in the case.

Appellants misstate the holding in *Stillman v. Aetna Ins. Co.,* 240 Fed. 462. No waiver or change in the terms of the policy was involved. The plaintiff stated the true facts to the agent, who, under the Iowa statute, was the company's agent. The statute also required that the application be attached to the policy before the company could rely on a breach of its terms. This was not done, so the schedule of warranties was

held inadmissible because of the statutory requirement. Another vast difference between the statute there involved and the California statute was that the Iowa statute stated specifically that the agent had authority to act for the company despite the policy provisions to the contrary.

Thomas v. Chas. Baker & Co. (A. Br. pp. 106-107), has already been discussed. It dealt with a recitation in the policy that the premium had been received.

At page 108 appellants say Section 633d of the *California Political Code* gave the appellee's local agent general powers. Then they say the local agent had possession of the I. C. C. A. cards and therefore knew of two cancellations when he issued the policy to Dr. Carfagni. But they don't say just what person had possession of the cards. Roloson was the countersigning agent under Section 633d, and the evidence doesn't show that he had any cards or any knowledge whatever. The only other person charged with the final passing on risks was Arnberger, and he stated definitely that he didn't know of Carfagni's past record.

Coming now to the California cases cited by appellants on the powers of agents to waive policy provisions, we search in vain for a case among them dealing with *Political Code* Section 633d.

In *Farnum v. Phoenix Ins. Co.,* 83 Cal. 246, agents customarily extended credit or time for premium payments. This custom was known to and acquiesced in by the insurance company. There was an incompleted cancellation for non-payment of premium.

In *Kruger v. Fire & Marine Ins. Co.,* 72 Cal. 91, the assured told the agent about kerosene on the premises and the agent said such a small quantity was all right. The case is thus different from ours. It holds, however, as we contend, that renewal policies are effected by the acts of the parties under the first or original policy.

In *Mackintosh v. Agricultural Fire Ins. Co.,* 150 Cal. 440, the facts were told to the agent who then tried to cover it by endorsement on the policy, but he put an insufficient indorsement on. Premium was charged for the added risk although the policy was not properly endorsed. The case therefore involved the question of a meeting of the minds and the intention of the parties to contract under certain terms and conditions which were incompletely expressed in the policy.

Sharman v. Continental Ins. Co., 167 Cal. 117, was decided in favor of the insurance company. Appellants did not read the ruling correctly. It was held that a local agent could not waive policy terms. (p. 123.) The opinion by the California Supreme Court is interesting from our standpoint because it recognizes non-waiver provisions in policies and intimates that if authority is given only to particular agents (such as president or secretary), that only such agent can waive the policy terms. (p. 124.)

Porter v. General Accident Assurance Co., 30 Cal. App. 198, is decidedly in our favor on several points. It holds that a countersigning agent cannot waive where the policy limits the power to waive to certain

specified agents. It was likewise held that the question asked of assured was *material.*

In *Bank of Anderson v. Home Ins. Co.,* 14 Cal. App. 208, the plaintiff told the company agent about other insurance. The agent told plaintiff he would note it on the policy; but he forgot to do it. The court carefully noted there had been no concealment. The effect of the non-waiver clause was not an issue because the waiver involved did not effect the terms of the policy. The appellants in their statement on the case do not correctly interpret its ruling.

In *Raulet v. Northwestern Ins. Co.,* 157 Cal. 213, there was no written application, there were no questions and answers, no inquiry by the company, and no misrepresentation, concealment, or fraud. Plaintiff was ignorant of the forfeiture provision. But finally, it was held that the encumbrance was not a chattel mortgage within the terms of the policy.

In *Knarston v. Manhattan Life Ins. Co.,* 140 Cal. 57, late payments of premiums were waived by acceptance. No change of the terms of the policy was involved.

In *Vierra v. New York Life Ins. Co.,* 119 Cal. App. 352, plaintiff asked that the policy cover from day of application and he was assured it would. The agent also took a note instead of cash. These facts show the case inapplicable to our case.

Appellants quote from *Arnold v. American Ins. Co.,* 148 Cal. 660, at p. 110 of their brief. But that case held the complaint was fatally defective. There it was

stated that one pint of gasoline was not a substantial violation. The agent said it was all right and adjusted the loss and accepted the premium. The language quoted deals with the question of knowledge by proper officers of the company. It is to be noted that it is all dicta in light of the holding. An essential difference from our case is pointed out, too, in that it is made necessary that the company lead the assured to rely on his policy as a valid policy "notwithstanding the breach of condition of which it knows."

Appellants argue that the presence of cards in appellee's files operated as a waiver, but Carfagni didn't know the cards were there and he didn't rely on any knowledge in the company. Nor do we agree with appellants when they say the only possible defense was that a written waiver was not attached to the policy as required. The trial court found on substantial evidence that there was *no waiver either orally or in writing.*

Although we have argued to the merits of appellants' contentions on the effect of *Political Code* Section 633d, we wish to urge that it cannot here be considered for the reason that the point was not made to the trial court.

> "In an action at law, this is a court for the correction of the errors of the court below exclusively. Questions which were not presented to, or decided by, that court are not open for review here, because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. Railway Co. v. Henson, 19 U. S. App. 169, 171,

> 7 C. C. A. 349, 351, and 58 Fed. 530, 532; Philip Schneider Brewing Co. v. American Ice-Mach. Co., 40 U. S. App. 382, 403, 23 C. C. A. 89, 100, and 77 Fed. 138, 149; Manufacturing Co. v. Joyce, 8 U. S. App. 309, 311, 4 C. C. A. 368, 370, and 54 Fed. 332, 333."
>
> *Board of Com'rs v. Sutliff,* 97 Fed. 270 at 275.

See also, *Board of Com'rs v. Home Savings Bank,* 200 Fed. 28 at 34.

In *Ex parte Keizo Kamiyama,* 44 Fed. (2d) 503 at 505 (9th Circuit), this court has recognized the rule by stating:

> "It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court, 3 C. J. 689, Sec. 580; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; Rodriguez v. Vivoni, 201 U. S. 371, 26 S. Ct. 475, 50 L. Ed. 792; Huse v. U. S., 222 U. S. 496, 32 S. Ct. 119, 56 L. Ed. 285."

E. APPELLANTS RELY ON INSUBSTANTIAL CONFLICTING EVIDENCE TO ARGUE THE QUESTION OF MISREPRESENTATION ABOUT PRIOR CANCELLATIONS.

Section XI of appellants' brief is founded upon shifting sands. Here they seek to defend the answer "no exceptions" by declaring it was the truth. They arrive at this by arguing that there was only *one* prior cancellation instead of four or five, and that the one cancellation was for a reason immaterial to the risk. Although the question of this misrepresentation by Payne is only collateral to the vital point of false

warranty, appellants are still trying to confine the defense to the former point. They even seek to dictate our stand by saying "the whole defense * * * depends on this one item." Then they try to reargue the evidence to this court, remarking about "the preponderance of the evidence."

In seeking to establish the misrepresentation as immaterial, appellants again fall into the error of ignoring the findings. There were at least four cancellations, not just one. Three companies had cancelled because the risk was undesirable. (Defendant's Exhibit A, Tr. p. 63 et seq., Tr. p. 81.) The trial court found from this evidence that the statement numbered 9 was material. In addition, the Home cancelled because Carfagni was a bad risk. (Tr. pp. 117, 118, 135, 136.) We shall also show that the statement is material as a matter of law. Appellants do not state the correct facts about the cancellations and the reasons therefor.

Appellants cite *Kleiber Co. v. International Ins. Co.,* 106 Cal. App. 709, on the question of a representation being material. There the evidence was that plaintiff's predecessors in interest had been cancelled because of their non-payment of premium. In addition to that, the statement was not made by the plaintiff, nor did he know it had been made. Even had he known of its existence, the evidence showed he did not know of any previous cancellation, although the company's agent did know of it.

In *Hawley v. Insurance Co.,* 102 Cal. 651, the cancellation was made because the company was retiring from business.

Appellants' statement of *Shawnee Life v. Watkins* (Okla., 1916), 156 Pac. 181, clearly shows the basis for that decision is upon the distinguishable fact that there was no breach of warranty, because the language of the question in the policy was ambiguous and not susceptible of the interpretation given it by the company.

A similar case is *Fidelity Mutual Life v. Miller,* 92 Fed. 63, 34 C. C. A. 211. The policy was construed so that the statement was not false. Nor did plaintiff know he had been rejected.

We have already discussed the *Raddin* case referred to at page 116 of their brief. They do not correctly analyze the decision.

Citation of cases is made dealing with life insurance applications as against accident and health rejections, and vice versa. These cases are not applicable here, where all the policies were automobile public liability policies.

Business Men's Assurance Co. v. Campbell, 32 Fed. (2d) 995, dealt with an ambiguous question. The answer was declared true under the question as construed. Application was for an accident policy. Rejection had been by a life insurance company.

In *Solez v. Zurich Ins. Co.,* 54 Fed. (2d) 523, the case was reversed for erroneous instructions. The court held that where one is a life policy and the other an accident policy, the question of rejection by one as material to the other is a question of fact. It can be seen from this that appellants have misconstrued the holding.

Guaranty Life v. Frumson (Mo. 1921), 236 S. W. 310, dealt with a withdrawal of the application by the assured himself.

Mutual Life Ins. Co. v. Ford (Texas), 130 S. W. 769, speaks for itsef. The answer made was simply incomplete and a fraternal organization was not contemplated by the question.

F. IN ARGUING ABOUT RESCISSION APPELLANTS IGNORE THE FINDINGS ON QUESTIONS OF FACT AND FAIL TO SHOW THAT THE NECESSARY ELEMENTS OF ESTOPPEL EXISTED.

In *Section XII* of appellants' brief we find an attempted argument that appellee was estopped to rescind. We shall later show by the authorities just what rights and remedies an insurance company has upon learning of a breach of waranty and a false representation. Suffice it to say, rescission was not the sole remedy. Secondly, there was no evidence sufficient to work an estoppel against the company's right to rescind. (*American Maintenance Co. v. Indemnity Co.,* 214 Cal. 608, supra.) The trial court found against appellants. The entire theory of estoppel tumbles because appellants produced no evidence showing that either Carfagni or Payne knew anything about the company's knowledge or lack of knowledge of Carfagni's past record. The evidence indicated that both Payne and Carfagni believed the company had no knowledge whatever. Therefore, this very essential element was lacking. Another element lacking was any *actual* knowledge of *all* the facts by anyone connected with the insurance company. A third element lacking was the utter failure of the plaintiffs below to show any authoritative action by some one

connected with appellee and having knowledge of the facts.

Murray v. Home Life, 90 Cal. 402, cited by appellants involved a *waiver* of non-payment of premium by acceptance of overdue payment.

We disagree with appellants' statement on page 122 of their brief that the uncontradicted evidence showed any of the facts therein referred to.

Silverberg v. Phoenix Ins. Co., 67 Cal. 36, involved a *finding* of full knowledge of all the facts. The court distinguished the case from an earlier decision on the ground that the one at bar did not involve a policy with a non-waiver provision.

In *J. Frank & Co. v. New Amsterdam Casualty Co.,* 175 Cal. 293, the insurance company sought to avoid liability on the ground that the assured was a corporation instead of an individual. The court decided there was a waiver because the company had defended the suit in which the assured had been designated a corporation, all to the knowledge of the company. The court pointed out that the non-waiver clause does not govern waivers of requirements after a loss has occurred.

Faris v. American National Co., 44 Cal. App. 48, involved a waiver by the secretary of the company. Under the non-waiver clause, the secretary was one of those given the power to waive. He asked for and collected the premium after default.

At page 124 (A. Br.) are cases already discussed by us. *Cotten v. Fidelity & Casualty Co.,* 41 Fed. 506, the

only new one there cited deals with a demand for and acceptance of the overdue premium after assured had died.

G. WHERE THERE IS A BREACH OF A WARRANTY CONTAINED IN THE POLICY, ARGUMENTS ABOUT LACK OF MISREPRESENTATION AND INCOMPLETE CONSTRUCTIVE KNOWLEDGE CANNOT BE USED TO ELIMINATE THE PLAIN PROVISION OF THE CONTRACT AGAINST ANY WAIVER OF ITS TERMS EXCEPT IN THE MANNER AND BY THE PERSONS AGREED UPON BY THE PARTIES.

Section XIII. For six pages appellants strive to "ambush" the authorities to be presented by appellee. They say any of our cases upholding non-waiver provisions are immaterial for three reasons. *First:* Because, they argue, the misrepresentation died or spent its force almost as soon as made. The findings and the evidence show that Payne's answer in 1929 was relied on by the company in 1931 and that Payne knew it would be and knew that it was in fact relied on by the company as soon as he read the 1931 policy. Moreover, the statement, being a warranty and a part of the policy, was made the assured's contract and the statement was adopted and confirmed by assured's retention of the policy. The Federal cases are not in conflict. Appellants have cited cases on facts entirely different from the ones at bar. They also misconceive the points involved. The question of consulting the assured is not important where we are dealing with a breach of warranty. Nor do appellants' cited cases fit the situation, because neither Carfagni nor Payne ever gave a true statement of all the facts to the company as was the fact in appellants' cited cases. Their

cited cases do not deal with a waiver at all, but more with an estoppel. Where the assured gives the facts and the company assures him the policy conforms, the company is estopped.

Secondly, appellants say our cited cases will be immaterial on non-waiver clauses because of the trial court's finding of constructive knowledge by the company of two out of four cancellations. Their statement that the "company itself knew of the cancellation of prior insurance" is not borne out by the evidence. Moreover, this argument fails to give effect to the other requirement of the non-waiver clause that the change of terms or waiver of them must be made in a writing attached to the policy.

Thirdly, they argue that our cases will be immaterial because the breach of the policy terms concerned a past transaction which could be waived despite the policy provision to the contrary. The answer to that is that the cases do not so limit the effect of non-waiver provisions. Another answer is that there is no evidence of any kind of a waiver in our case. The trial court found as a fact that there was no waiver of any kind, either orally or in writing. The case of *Northwestern Nat. Ins. Co. v. McFarlane,* 50 Fed. (2d) 539, is a case we cited to the trial court. We find appellants now using some of the language from that case. The language is not applicable to our facts and findings. Further quotation from the case will illustrate that it is authority for our position in this case:

> "The action is brought not upon the policy as written, but upon the verbal agreement or under-

standing between the agent of the company and the owner of the property insured at the time the written contract became effective as between them, as constituting a waiver of the written agreement, or as raising an estoppel against enforcing its provisions."

* * * * * * *

"But we think that the evidence shows that the written and oral agreements were contemporaneous and should be considered as one transaction, regardless of whether the physical possession of the policy had passed from the agent to the appellee. It is conceded that a written agreement cannot be modified or affected by a contemporaneous oral agreement between the parties, conflicting with the terms of the writing, and this is the statutory law in California."

* * * * * * *

"the Supreme Court is definitely committed to the proposition that mere knowledge by the insurance company of conditions which would constitute a breach and forfeiture therof at the time of its issuance, does not operate as a waiver of the express terms of the written policy."

* * * * * * *

"It will be observed that the policy in the case at bar does not provide for a forfeiture in the event that the building is vacant. It merely undertakes to insure the building while it is occupied and during the first ten days of any period of vacancy. The policy says nothing about a vacancy permit. It makes the obligation of the company during vacancy dependent upon a written modification of the contract subsequently agreed to and indorsed on or added to the policy. It provides that the building is not insured when vacant for

more than ten days. The effect of the verbal agreement was exactly the opposite. There was no waiver of a forfeiture, because the policy contained no provision for a forfeiture."

The case then holds as follows:

"It seems clear from the foregoing authorities that the agreement of the agent, with reference to prospective vacancies being oral, and in direct conflict with the terms of the policy, was not binding upon the company, not only for the reason that evidence of an oral agreement contemporaneous with and in contradiction of a written agreement is not admissible to vary the terms of a contract, but also because it further appears from the contract itself that the agent of the company was not authorized to amend or vary the contract, except by a writing attached thereto or endorsed thereon."

The dictum quoted by appellants says in effect that if the company pays a small loss *with knowledge* of a ten day vacancy it will be a waiver of that particular period of vacancy; but it cannot be regarded as a continuing waiver nor a waiver of a longer period of vacancy. It was really a question of coverage during a vacancy and did not involve the question of waiver of a forfeiture. Since the case holds for the insurance company the last part of the decision was not necessary. Nor is it of any use to appellants here, where there was no evidence of a waiver of any kind and the trial court so found.

H. WITH FOUR OR FIVE CANCELLATIONS ADMITTED BY APPELLANTS' OWN WITNESSES, AN ATTEMPT IS MADE TO ARGUE THAT THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

Section XIV of appellants' brief argues that the evidence does not support the findings on cancellations. Here they try to inject error by use of the court's memorandum opinion. As already indicated, the opinion is no part of the findings. The point about the "American Indemnity Company" is illustrative of their fallacious reasoning. The trial court inadvertently said in its memorandum opinion something about a cancellation by the American Indemnity Company. This mistake was corrected in the findings.

Not only was there sufficient evidence of cancellations by the four companies as we have already indicated, but there was also evidence of confirmation of and acquiescence in those cancellations by Carfagni's authorized agent.

We are not here dealing with the sufficiency of a cancellation under the requirements of a particular policy. We are dealing solely with the sufficiency of the evidence to support a finding of cancellation. Under the cases hereinafter cited, there was substantial evidence of cancellations. Payne had full powers and could accept cancellation and ratify it on behalf of Carfagni.

Their cases on proof of cancellation deal with the requirements under a policy where the company cancelling is seeking to establish the fact. In our case the only question is the sufficiency of the evidence to

sustain the finding. (See *Barker v. Gould,* 122 Cal. 240 at 243, and other cases to be cited by us.)

The appellants' cases on the power of a broker to accept cancellation deal with agents "to procure". The evidence shows Payne had full powers in every particular.

In appellants' case of *White v. Ins. Co. of N. Y.,* 93 Fed. 161, the court held the broker's authority was great enough to accept cancellations and replace in other companies.

In *Adams v. The Manufacturer's Ins. Co.,* 17 Fed. 630, the court reversed the cases for a new trial to allow the company a chance to prove the broker's authority to receive notice of cancellation.

In *Magruder v. U. S.,* 32 Fed. (2d) 807, they could not interpret the language used by the assured to mean a request for cancellation.

In *Cronenwett v. Iowa Underwriters etc.,* 44 Cal. App. 571, the jury merely found there was no evidence of authority to cancel. Most of the cases cited by appellants are of this nature, where evidence was lacking on the subject of the broker's authority. Payne had full powers. (Tr. pp. 60, 82-83.)

Appellants cannot now argue on the facts. We shall later point out in detail that the record supports the findings in every particular. Payne's own testimony left no room for doubt that at least four companies cancelled and that Payne accepted and acknowledged these cancellations. He treated them as cancellations and tried to replace the risk with another company in each instance. (Tr. pp. 60-63, 81.)

The appellants have gone far afield of the issues. As we have already stated, we have only to consider whether the findings are supported by any substantial evidence. If they are, then we have to consider whether the conclusions of the trial court were correct in law under those findings. Resort cannnot be had to the memorandum opinion for the purpose of attacking either the findings or the decision.

THE MEMORANDUM OPINION OF A TRIAL COURT CANNOT BE USED BY APPELLANTS.

The findings of fact and conclusions of law stand as the last expression of the trial court upon the evidence and the law. After the memorandum opinion was filed the parties prepared findings and counter findings. The findings were settled by complete discussion of both sides before the court. The entire matter was again presented upon a motion for a new trial. Appellants cannot now seek to inject error by means of the trial court's preliminary opinion, which is no part of the findings nor of the evidence.

The court for this circuit has so expressed itself in *Pacific Sheet Metal Works v. California Canneries Co.,* 164 Fed. 980 at 984:

> "It has been distinctly held that the opinion of the court, assigning reasons for its conclusions, cannot be treated as a special finding. British Queen Mining Co. v. Baker Silver Mining Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. ed. 147. Nor can the opinion of the trial court be considered for the purpose of helping the findings.

Saltonstall v. Birtwell, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128. Nor for the purpose of modifying or controlling the findings. Stone v. U. S., 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477; Townsend v. Beatrice Cemetery Ass'n, 138 Fed. 381, 70 C. C. A. 521; Kentucky Life & Accident Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42; Hinkley v. City of Arkansas City, 69 Fed. 768, 16 C. C. A. 395."

See, also:

Isaacs v. DeHon, 11 Fed. (2d) 943.

In *Crocker v. U. S.,* 240 U. S. 74, 36 S. Ct. 245, 60 L. Ed. 533, the Supreme Court states the rule:

"In the briefs reference is made to portions of the opinion delivered in the court of claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in Stone v. United States, 164 U. S. 380, 382, 383, 41 L. ed. 477, 478, 17 Sup. Ct. Rep. 71, that 'the findings of the court of claims in an action at law determine all matters of fact precisely as the verdict of a jury', and that 'we are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings'. See also Collier v. United States, 173 U. S. 79, 80, 43 L. ed. 621, 622, 19 Sup. Ct. Rep. 330; United States v. New York Indians, 173 U. S. 464, 470, 43 L. ed. 769, 771, 19 Sup. Ct. Rep. 487."

THE FINDINGS OF THE TRIAL COURT ARE CONCLUSIVE ON THIS APPEAL.

The rule of law enunciated is followed in both state and federal courts. The language used will be illuminating. There can be no place for argument on facts in an appeal of this sort.

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive * * *"
>
> *Stanley v. Supervisors of Albany Co.,* 121 U. S. 535, 30 L. Ed. 1000.

In the case of *Independence Ind. Co. v. Sanderson,* 57 Fed. (2d) 125 at 129, the Circuit Court for the Ninth Circuit had this to say:

> "In cases of this character, the judgment of the trial court, a jury having been waived, has the force and effect of the verdict of a jury, and the judgment will not be reversed where there is substantial evidence upon which to base it."

The rule is clearly stated in *U. S. v. Tyrakowski,* 50 Fed. (2d) 766 at 771:

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive. It matters not how convincing the argument is that upon the evidence the findings should have been different. Stanley v. Supervisors of Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000; Dooley v. Pease, 180 U. S. 126, 21 S. Ct. 329, 45 L. Ed. 457."

In *Aetna Ins. Co. v. Licking Valley Milling Co.,* 19 Fed. (2d) 177, we find the Circuit Court using this language:

> "this court is bound to accept the fact conclusions of the trial court, so far as supported by any substantial testimony."

An interesting discussion on the subject is to be found in *Easton v. Brant,* 19 Fed. (2d) 857 (9th Cir.), where the court said:

> "On the foregoing facts, the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact. Savage v. Shields (C. C. A.), 293 F. 863. Second, a person who seeks to vary the terms of a written contract, or to establish a secret trust as against another, assumes a heavy burden, and must make out his case by clear and unmistakable evidence. In such cases the court is not bound to accept the uncorroborated testimony of an interested party, even though his testimony is not contradicted."

This court has held to the rule in no uncertain terms in the case of *San Fernando Copper Mining Co. v. Humphrey,* 130 Fed. 298 at 300. The court said:

> "It is assigned that the court erred in making the finding, but such a finding is not subject to revision by this court if there were any evidence upon which it could be made. Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; St. Louis v. Rutz, 138 U. S. 241, 11 Sup. Ct. 337, 34 L. Ed. 941; Runkle v. Burnham, 153 U. S. 225, 14 Sup. Ct. 837, 38 L. Ed. 694; McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136; Empire State M.

> &. D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 52 C. C. A. 219. The question so submitted to the court was one of fact to be decided on the evidence. It is not our province to review the evidence further than may be necessary to discover that the case is not one wherein there was no evidence to justify the finding."

The Supreme Court has recognized the doctrine in *Dooley v. Pease,* 180 U. S. 126, 45 L. Ed. 457, a leading case. We quote from that case:

> "Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley v. Albany County Supers.,* 121 U. S. 547, 30 L. ed. 1002, 7 Sup. Ct. Rep. 1234.
>
> Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals or by this court, if there was any evidence upon which such findings could be made. *Hathaway v. First Nat. Bank,* 134 U. S. 498, 33 L. ed. 1006, 10 Sup. Ct. Rep. 608; *St. Louis v. Rutz,* 138 U. S. 241, 34 L. ed. 946, 11 Sup. Ct. Rep. 337; *Runkle v. Burnham,* 153 U. S. 225, 38 L. ed. 697, 14 Sup. Ct. Rep. 837."

The court for the Ninth Circuit held in *Pacific Sheet Metal Works v. California Canneries Co.,* 164 Fed. 980 at 982-3 as follows:

> "this being an action at law, and before us on writ of error, the finding of the Circuit Court as to the fact, if there was any evidence upon which to base the finding, is conclusive here.

King v. Smith, 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708; Eureka County Bank v. Clarke, 130 Fed. 326, 64 C. C. A. 571; Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. ed. 457; Stanley v. Supervisors, 121 U. S. 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694; Hathaway v. Bank, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004."

The rule in California is just the same. In *Barker v. Gould,* 122 Cal. 240 at 243, the court sustained a finding *based upon an opinion* of the witness.

Every inference, presumption, and fact will be sought by the Appellate Court to sustain the judgment. For instance, the finding by the trial court that appellee knew of two cancellations will not be distorted as appellant has distorted it, to mean that the Home Office officials had actual knowledge of these cancellations. The most that can be said of that finding from an examination of the evidence is that the cards of the credit association were in the company's files and that the company had *constructive* knowledge of their contents.

EVERY FINDING MADE BY THE TRIAL COURT HAS CLEAR AND UNEQUIVOCAL SUPPORT IN THE RECORD. THESE FINDINGS FROM SUBSTANTIAL EVIDENCE ARE DETERMINATIVE OF THIS APPEAL.

It is our purpose to illustrate by specific reference to the record how the findings can be supported under the rule just discussed.

Finding I has to do with the allegations in the complaint to support the right of action in the plaintiffs below. We need not refer to the record on that.

Finding II deals with appellee's insurance policy and its terms. The policy is in evidence (Tr. pp. 29-57) as part of plaintiffs' case.

Finding III: (a) Statement 9 was found to be a material warranty to the effect that no company had cancelled or refused to issue any kind of automobile insurance for the assured during the three years last past. This finding is true as a matter of law, as we shall show later.

(b) Statement 9 was found to be untrue and that said warranty was breached because,

1. The Home Accident and Home Fire Insurance Company of Little Rock, Arkansas, had cancelled as a bad risk (Tr. pp. 117, 118, 135, 136) on or about August 11, 1928, a policy previously issued to the assured on July 27, 1928. (Tr. pp. 112-113, Defendant's "Exhibit B" p. 114, pp. 130-132, pp. 133-142.)

2. The Travelers Insurance Company had cancelled as an undesirable risk on or about September 15, 1928, an automobile insurance policy it had previously issued to Fred Carfagni, assured. (Tr. p. 60 (Payne's authority to act for the assured Carfagni), Defendant's "Exhibit A" p. 63 et seq.; p. 81 (where Payne refers to "these cancellations" in Defendant's "Exhibit A" and "that there was trouble with

losses and the companies thought that the risk was not desirable").)

3. The Washington Underwriters Company cancelled as an undesirable risk on or about October 5, 1928, its policy of automobile insurance previously issued to Dr. Carfagni about September 5, 1928. (Tr. pp. 80-81, Defendant's "Exhibit A" p. 63 et seq.)

4. The Western States Insurance Company likewise cancelled on or about June 1, 1929, its automobile policy. (Defendant's "Exhibit A" p. 63 et seq., Tr. pp. 80-81.)

It is to be noted that Carfagni's agent Payne had full authority to act in all matters pertaining to Dr. Carfagni's insurance. (Tr. pp. 60, 82-83.) It is also interesting to note that these four policies which were cancelled were all placed by Payne under the same category in his ledger sheets (Defendant's "Exhibit A") as they were in his testimony. (Tr. p. 81.)

(c) It was found that on or before June 1, 1929, and prior to May 13, 1931, Fred Carfagni, in procuring the first policy from appellee, by and through his agent (Payne) falsely represented to appellee that there had been no losses or cancellations of automobile insurance by any other company and that it was in order for appellee to write its first policy of insurance. (Tr. p. 148 (showing Leo Pockwitz Co. were general agents for appellee), Tr. pp. 149-150, 162-163, 202-203).)

(d) It was found the policy of Fred Carfagni here in suit, issued May 13, 1931, was renewed and based on the information and statements in the first policy issued about June 1, 1929. (Tr. pp. 28-29, 108, 164, 211.)

Finding IV: (a) It was found that at the time appellee issued its policy of 1931 to Fred Carfagni it had knowledge of the cancellation by the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas of its policy previously issued to Carfagni. The record supports this only in so far as it was a constructive knowledge. (Tr. pp. 227, 230, 234, 237.) Mr. Arnberger was the person in appellee's office charged with acceptance or rejection of risks (Tr. pp. 201-202, 212) and he had no knowledge whatever concerning prior cancellations against Carfagni. (Tr. pp. 203 and 217.) Appellants produced no evidence other than the presence of 2 cards in appellee's files showing only 2 of the cancellations.

(b) Constructive knowledge of a prior cancellation by the Pacific Employers Insurance Company was found by the court and is supported by the evidence. (Tr. pp. 226-227, 230, 232.)

(c) The court found that appellee did not have any knowledge concerning the details or particular reasons for these two prior cancellations. (Tr. pp. 203, 217, 229.)

(d) It was found that appellee did not have any knowledge whatever concerning the prior cancella-

tions by the Travelers Insurance Company, The Washington Underwriters Company, or the Western States Insurance Company. (Tr. p. 228 shows none of these companies was a member of the I. C. C. A. bureau, and hence that the appellee could not have had any cards in its files on these companies.) Transcript pages 203, 217 show the underwriting officer had no knowledge of any prior cancellations. The rest of the record is devoid of any showing of knowledge by appellee of prior cancellations.

(e) The court found that appellee's policy had a non-waiver provision. (Tr. p. 53.) Only the president or secretary of the company could waive policy provisions by an endorsement in writing attached to the policy. Knowledge possessed by any agent of the company could not be held to effect a waiver. This policy was in the possession of assured's agent and assured, Carfagni, was bound by the terms of his contract. (Cases later.)

(f) The court found that no warranty, provision or condition of the policy was ever waived or altered. (We invite a careful inspection of the entire record for the evidence supporting this finding. Nowhere in the record can be found the slightest evidence of a voluntary relinquishment of a known right by anyone connected with appellee and having authority so to do. Further support for this finding can be had from the cases giving full effect to this non-waiver provision in the policy.)

(g) It was found that no writing nor written endorsement was executed by appellee or attached to

the policy and signed by the president or secretary waiving or changing any of the warranties or provisions of the policy in question. (Plaintiff's Exhibit 1, p. 29 et seq.)

Finding V: (a) The court found that by reason of the falsity and breach of the material warranty of Declaration No. 9, the policy was void and never attached to the risks therein mentioned. (We have already referred to the record showing the breach and falsity of this warranty. The effect of this is a matter of law.)

(b) It was found that appellee advised Carfagni about June 30, 1931, that the policy was void and that it would accept no liability. (Tr. pp. 170-173, 175-176, 197.)

(c) It was found that appellee tendered and offered to restore to Carfagni the full amount of the premium paid on the policy. (Tr. pp. 175-176, 180, 182.) That Carfagni did not object to the mode, kind, or amount of the tender. (Tr. pp. 182, 170-173.)

(d) It was found that appellee did not accept or assume any liability under the policy of May 13, 1931. (Tr. pp. 174, 175-176, 170-173, 197.)

Of the conclusions of the law made by the court we shall have more to say later. We have illustrated line for line that all the findings are supported by substantial evidence in the record.

BASED UPON CORRECT FINDINGS, THE DECISION OF THE TRIAL COURT WAS SOUND UNDER ALL THE AUTHORITIES.

With the findings supported by the evidence, was the decision of the court correct in law?

A. ALL DEFENSES AVAILABLE AGAINST ASSURED WERE AVAILABLE AGAINST THE APPELLANTS.

(1) The California rule.

In interpreting Statutes of 1919, page 776, the leading California case of *Hynding v. Home Accident Insurance Co.,* 83 Cal. Dec. 196, seems to be the first case on the subject in California. That case is clear authority for the proposition that the insurance company may set up whatever defense it has on the policy as against the injured party. The case refers also to Federal cases hereafter mentioned. Following the *Hynding* case, we have the case of *Sears v. Illinois Indemnity Company,* 68 C. A. D. 957, in which the authorities are reviewed at great length and in which it is also held that any acts avoiding the policy done by the assured may be set up by the insurance company in an action against defendant by the injured person.

(2) The Federal rule.

Independently of California decisions, the United States Circuit Court of Appeals for the 9th Circuit decided that the insurance company could use the defense it had on the policy against the injured person. Such a decision appears in *Metropolitan Casualty Insurance Company v. Colthurst,* 36 Fed. (2d) 559. It would undoubtedly be the rule now that the

Hynding case has been decided by the Supreme Court of California.

Following the *Colthurst* case, we have the case of *Royal Indemnity Co. v. Morris,* 9th Circuit, 37 Fed. (2d) 90, adopting the same rule.

A similar decision was handed down in the case of *N. J. Fidelity, etc. Co. v. Love,* 43 Fed. (2d) 82, in which reference is made to the *Colthurst* and the *Royal Indemnity* cases.

(3) General rule.

Indeed it seems to be the general rule from the statement in *Sunderlin on Automobile Insurance,* page 417, paragraph 782, where it is said:

> "When the injured claimant becomes a judgment creditor of the assured, he has a direct right of action against the insurer, but provisions of the liability policy pertaining to notice of accident, or the insurer's right to defend on account thereof, and all other matters arising under the policy are likewise binding upon such judgment creditor."

B. DECLARATION NUMBER NINE "NO COMPANY HAS CANCELLED OR REFUSED TO ISSUE ANY KIND OF AUTOMOBILE INSURANCE FOR THE ASSURED DURING THE PAST THREE YEARS EXCEPT AS FOLLOWS: NO EXCEPTIONS", IS AN AFFIRMATIVE WARRANTY.

1. It is a warranty because of certain policy provisions.

Number II of the policy is as follows:

> "National Union Indemnity Company, Pittsburg, Pennsylvania, hereinafter called the Company, does hereby agree, *in consideration of* the premium herein, *the schedule of declarations and*

compliance with the provisions hereinafter mentioned; * * * to insure the assured * * *."

Under the provisions of this Part II, we have the provision "J", as follows:

> "*Declarations.* The several statements in the Declarations are hereby made a part of this policy and are warranted by the assured to be true."

2. The declaration concerning no previous cancellations is a warranty under the law.

(a) *California Code Provisions: Civil Code,* Section 2607, says:

> "A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof."

In *Couch Cyc. on Insurance,* Vol. 4, paragraph 864, it is said that where the applicant warrants the statements in the application to be true and the policy recites that it is issued in consideration of the statements, agreements and warranties in the application, and it is referred to and made a part of the policy, such statements become warranties. Supporting this proposition is the case of *U. S. F. & G. v. Maxwell,* 237 S. W. 708 (Ark.).

In *Roberts v. Aetna Insurance Company,* 58 Cal. App. 83, the policy said that any false representation by the assured would render the policy void. The application made representations therein warranties and made them a part of the policy. The Court held: "When the policy refers to the application and makes

it part of the policy, any breach of the conditions or representations which are warranties voids it."

(b) The Federal cases holding such declaration to be a warranty, are:

Hubbard v. Mutual Insurance Co., 100 Fed. 719;

Home Life Insurance Co. v. Myers, 112 Fed. 846 (8th Circuit).

In *Doll v. Equitable Life,* 138 Fed. 705, it is held that a declaration concerning family health is a warranty.

See, also, the leading case of *Taylor, et al., v. American Liability Co.,* 48 Fed. Rep. (2d) page 592 at 593.

C. THE STATEMENT "NO EXCEPTIONS" WAS FALSE AND THERE WAS A BREACH OF WARRANTY.

1. Warranty confirmed by assured.

The statements in the declarations, including declaration No. 9 in the original policy, were inserted by Leo Pockwitz & Co., by and through Miss Hearney, after an inquiry to Mr. E. H. Payne, broker, and a false confirmation that the statements were true. Any misstatement of the broker would be binding upon the insured.

It is held in 32 *C. J.* 1337 (Note 1):

> "Where the misstatement in the application is placed therein by a broker acting as agent for the insured, it is binding upon insured."

It is further stated as a general rule in 32 *C. J.* 1335 (Note 80):

"Where an application contained a statement by insured that he had never been refused other insurance, it is not made the statement of the company by the fact that one of its officers, with a rubber stamp, added the words 'no exceptions' after the statement."

2. The delivery of the policies and retention of them by the broker creates an adoption by the assured of the declarations and statements contained in the policy as the declarations and statements of the assured.

(a) The general rule on this point has been stated in 32 *C. J.* 1337, where it has been declared that where the policy, if read, would disclose the falsity of the representation to the assured (where answers were written in by the agent for the company) "* * * it is under such circumstances the duty of the insured to discover, within a reasonable time, the untruthfulness of the representations constituting an inducement for the issuance of the policy, and, upon discovery of their untruth, he is bound to notify the company, and, if he fails to do so, the policy may be avoided in the same manner as if the false statements had originally been made with his knowledge."

New York Life v. Fletcher, 117 U. S. 519, 29 L. Ed. 834; and *Layton v. New York Life* (Cal. App.), 202 Pac. 958, are cited in support of this rule.

(b) In California, the case of *Kahn v. Royal Indemnity Company,* 39 Cal. App. 180, holds that the possession of a policy by the broker, who procured it at the instance of the insured, is as effectual as possession by the assured for the purpose of charging knowledge of statements contained in the application.

That was a case where the application had not been signed by the assured; and in *Madsen v. Maryland Casualty Co.,* 168 Cal. 204, at 206, it is held that the failure of assured to read the policy will not prevent enforcement of its provisions against him even where the application was made out by the company's agent with knowledge of the falsity of the warranty. Cases cited therein on this point were *Sharman v. Continental Insurance Co.,* 167 Cal. 117, and *Modern Woodmen v. Tevis,* 117 Fed. 369.

Akin to this subject are the following propositions:

Delivery of a policy to a person who is agent for the assured for the purpose of procuring insurance is sufficient delivery; similarly, delivery to the broker through whom the application was made, is sufficient delivery to assured.

32 *C. J.* 1126, 1127.

In the case of *Layton v. N. Y. Life,* 55 Cal. App. 202, referred to above, it was held that it was no excuse that the assured never saw his policy nor read it, when there was no excuse why he could not have done so had he desired. It is to be noted that *Judge Kerrigan* concurred in that opinion.

(c) The Federal rule will follow the rule as stated by the authorities above quoted.

See the leading cases of:

N. Y. Insurance Co. v. Fletcher, 117 U. S. 519, 529 and 531, 29 L. Ed. 834, holds that despite the fact that the answers in the application had been prepared by agents in the company, it was the duty of the assured

to read the application he had signed. It was also held that the assured could have seen it in the policy and that retention of the policy was an approval of the application and its statements. Likewise, in the case of *Home Life Insurance Co. v. Myers,* 112 Fed. 846 (8th Circuit), it was held that the assured, in accepting the policy, recognized its terms and could not repudiate it. The same doctrine was followed in *Wyss-Thalman v. Maryland Casualty Co.,* 193 Fed. 55, Circuit Court of Pennsylvania, 1910, where the court said:

> "* * * and that by the delivery of the policy to the assured he is put upon notice of the conditions therein expressed."

In *Maryland Casualty v. Eddy,* 239 Fed. 477 (6th Circuit), the case of *Lumber Underwriters v. Rife,* 237 U. S. 605, 59 L. Ed. 1140, is quoted as follows:

> "No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party."

D. THE GOOD FAITH OF THE ASSURED IN A QUESTION OF BREACH OF WARRANTY IS IMMATERIAL.

The leading case upon this subject was written by Judge Kerrigan during the time that he served as a distinguished member of the California District Court of Appeals. Under an indemnity bond, the court held that statements in the application as to the honesty of an employee were warranties in fact. It was found that the warranties were false. The good faith of the insured was held immaterial.

See:

Wolverine Brass Works v. Pacific Coast Casualty Co., 26 Cal. App. 183.

E. THE WARRANTY UPON PRIOR CANCELLATIONS WAS FALSE IN FACT.

From the history of cancellations outlined by the witness E. H. Payne, it is plain that warranty No. 9 was untrue, both at the time of the original policy and at the time of the renewal of policy No. 627,670, countersigned May 13, 1931, effective June 1, 1931.

It is true that the only cancellation which the witness Payne would concede was that of the Home Accident Insurance Company of Arkansas. This policy was cancelled August 15, 1928, less than three years from the date of the original policy, and also of the last policy of June 1, 1931. However, under the testimony of witness Payne, he stated that his record showed replacements, so that he further testified replacements were the same as cancellations. He explained this identity by stating that when a company elected to cancel it called him up during the year of cancellation and asked him to replace the business because they intended to cancel the policy which was then held by them. Under this explanation, the Travelers Insurance policy was issued August 13, 1928, and cancelled and replaced in another company September 15, 1928. The Western States policy was also cancelled on or about June 11, 1929.

Therefore, the falsity of the statement in the schedule of declarations is obvious when one reiterates the

history of cancellations within the three-year period of either the original policy or the renewed policy of June 1, 1931, to-wit:

	Policy Issued	Cancelled and Replaced
Home Accident Company of Arkansas	7/27/28	8/15/28
Travelers Insurance	8/13/28	9/15/28
Western States Group	10/5/28	6/11/29
The Washington Underwriters	9/5/28	10/5/28

Payne as an agent with full powers and in complete charge of assured's insurance business, had authority to receive and accept cancellations.

Northern Assur. Co. v. Standard Leather Co., 165 Fed. 602;

New Zealand v. Lason Lumber Co., 13 Fed. (2d) 374.

Holding that one may ratify an informal cancellation by taking out a policy in another company, see:

Arnfeld v. Guardian Assurance, 172 Pa. 605, 34 Atl. 580;

Hopkins v. Phoenix, 78 Ia. 344, 43 N. W. 197;

Kelsea v. Phoenix Ins. Co., 78 N. H. 422, 101 Atl. 362.

The evidence in our case shows that Payne not only accepted and ratified the cancellations by taking out policies in other companies; but he also acknowledged that he, as assured's agent, regarded them as and construed them to be cancellations. (Tr. p. 81.)

F. THE RENEWAL OF THE POLICY WAS BASED UPON ORIGINAL POLICY INFORMATION AND CONSTITUTED NO WAIVERS.

Please see:

Syndicate Insurance Co. v. Bohn, 65 Fed. 165 at 170 and 171.

That case holds that the warranty made in the original policy is reiterated on renewal and if any facts have arisen between the time of the original policy and the time of the renewal which would make the warranty false, that the warranty made in said renewal policy would relate to such facts and render said warranty false as of the time made, to-wit, upon renewal.

In *Joyce on Insurance,* Vol. 4, page 3530, paragraph 207, subdivision K, it is said:

> "Statements by assured in an application for an accident policy that he had not been disabled nor received medical or surgical attention during the past five years, are material and when attached to and made a part of the policy, are affirmative warranties, and when reaffirmed in a renewal certificate are falsified where there have been frequent consultations and attendance by physicians and experts and trips abroad, under serious physical and mental conditions, for treatment." (Citing cases.)

In Volume 3 of the same work, Section 2005, page 3358, it is said:

> "But it is held that warranties in an accident policy as to sound health and medical attendance on which the original policy is based, attach to the renewal thereof and relate to the time when

made, where no additional application is made or questions asked."

In *Maryland Casualty v. Campbell,* 255 Fed. 437, it is held that statements or declarations made in the original policy are repeated upon renewal.

The case of *Soloman v. Federal Insurance Co.,* 176 Cal. 133, holds that in the absence of a new application or new information showing a different intention, the renewal of a fire insurance policy is impliedly made on the basis that the statements in the original application or policy are still truthful, accurate and operative.

G. THE TRIAL COURT FOUND THE WARRANTY OF STATEMENT NUMBER 9 MATERIAL AS A MATTER OF FACT; BUT IT HAS ALSO BEEN DECLARED MATERIAL AS A MATTER OF LAW BY THE AUTHORITIES.

1. Rule in California.

By reason of *Civil Code,* Section 2610, the breach must be material to avoid the policy. The test of materiality of a breach of warranty is set forth in *Civil Code,* Section 2565, which says:

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, informing his estimate of the disadvantages of the proposed contract or in making his inquiries."

It would seem that that section makes it a question of fact as to whether or not the warranty is material. We believe, however, that it has been established in

California that the materiality is a question of law under circumstances such as exist in our case.

It has been held that the materiality of the thing warranted with relation to the risk is of no consequence, since the warranty itself is regarded as an implied stipulation that the thing warranted is material.

Soloman v. Federal Insurance Co., 176 Cal. 133;
Bayley v. Employers Liability Corporation, 6 Cal., unreported, 254, 56 Pac. 638.

In *McEwen v. New York Life Insurance Co.,* 23 Cal. App. 694 at 697 and 698, it is held that where the representations or answers in an application are in response to written questions and are themselves in writing, the materiality is one of law "* * * the parties, by putting and answering the questions, have indicated that they deemed the matter to be material". (Quoted from *May on Insurance,* Section 185.) The court then says that this rule set forth in *May* has been modified in Section 2565 and goes on to say: "Conceding that by reason of this statute the rule laid down in *May on Insurance,* Section 185, and followed by the courts in many states, is not applicable, we are nevertheless, of the opinion that under the statute the materiality of the representation was a question of law for determination of the court and not the jury."

The Supreme Court denied a petition for a hearing in the *McEwen* case, and in the second trial on appeal of the *McEwen* case in 42 Cal. App. 133, the same rule is applied and the court referred to *Hubbard Mutual*

Association, 100 Fed. 726, and *Jeffries v. Economical Insurance Co.,* 22 L. Ed. 833, where it was said:

> "It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of the jury."

In *Bennett v. Northwestern Insurance Co.,* 84 Cal. App. 130, it was held that an affirmative warranty was a condition precedent and if breached the policy would never attach and that this was without regard to the materiality of the facts warranted. The court refused to pass upon Section 2611, *Civil Code,* concerning the modification of the rule, inasmuch as the policy itself expressly declared that it would be void for misrepresentation of a material fact. The court said:

> "* * * A misrepresentation is material which would affect the rate of premium or influence the insurer in accepting or rejecting the risk."

In *Slinkard v. Manchester,* 122 Cal. at 599, it was held that Section 2611 of the *Civil Code* is but a re-enactment of common law and the question of materiality or immateriality does not arise if the provision appears in the policy, for, by so including it, it is made material. The court held that it was error to admit evidence concerning the increase of risk.

In *Los Angeles Athletic Club v. Fidelity Co.,* 41 Cal. App. 439 at 446, the court said:

> "Respondent contends that this condition of the policy requiring prompt notice of the acts constituting the basis of a claim is not material to the

rights of defendant, and that under the Civil Code, Section 2611, the violation of an immaterial provision of a policy does not avoid it, unless it is so expressly declared in the policy. The contention that this expressed condition for prompt notice is not material to the contract is not sustained by respondent's authorities, and is contrary to the generally recognized construction of such requirements in insurance policies. Respondent's citation to the effect that notice is not material unless it is shown that injury has resulted from the failure to give same, in nearly every instance, deal with the implied requirements of notice under the general law of guaranty and suretyship. Here the parties expressly stipulated in their written contract for prompt and specific notice."

The court cites:

Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386 at 390, 19 L. Ed. 257;

California Savings Bank v. American Surety Company, 87 Fed. 118.

The case of *Employers v. Industrial Accident,* 177 Cal. 771 at 776, bears out this rule although it is there held not a warranty and therefore the question of its materiality was a question of fact. It was held not a warranty because it was not a part of the policy.

2. The Federal rule.

The Federal rule seems to be the same as the California rule, and even in cases where the statements are considered representations, they are regarded as material under circumstances such as exist in our case.

In *Union Indemnity v. Dodd,* 21 Fed. 2d 709, it was held under a statute of Virginia which said that all statements in the application were to be construed as representations and not warranties and that breach should not bar recovery unless shown that the answer was material to the risk that the state court's interpretation of the state statute would be followed. The plaintiff had stated that he had not received indemnity for more than one accident when in fact he had received it several times. The application had been made a part of the policy. The court held:

> "Upon the question of whether the materiality of a representation was a question for the court or for the jury, the Virginia court has said 'whether a representation is made and the terms in which it is made are questions of fact for the jury, but, when proved, we are of the opinion that its materiality is a question for the court'."

The court goes on to quote from *Jeffries v. Insurance Co.,* 22 Wall. 47, and 22 L. Ed. 833:

> "But if, under any circumstances, it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial."

The court then cites *Mutual Life Insurance v. Hilton-Green,* 241 U. S. 613, 60 L. Ed. 1202.

The rule is apparently a logical one and its logic is brought home by the case of *Marshall v. Scottish, etc., Insurance Co.,* 85 L. T. N. S. (Eng.) 757, where it is said:

> "It is not necessary for the insurance office to show that, if the disclosure had been made, they would not have granted the policy. They are entitled to the information in order to make up their minds. Then it is material and important."

Concerning evidence on the materiality of the warranty, we have the question in the schedule of declarations and the answer therein, and we have the statement in the policy to the effect that the policy is issued in consideration of the statement, and we have the additional provision that all of the statements in the schedule of declarations are warranted to be true. Under those circumstances and in view of the authorities above outlined the question of materiality would undoubtedly become a question of law. It would probably be unnecessary to go any further in the matter; however, it may be helpful to note the case of *Boyer v. U. S. Fidelity,* 77 C. D. 183, wherein the case of *Pennsylvania Mutual Life Insurance Company v. Mechanics Bank,* 72 Fed. 413, is quoted as follows:

> "The great weight of authority in this country, however, is against the view that an insurance expert may be asked his own opinion whether the undisclosed or misrepresented facts were material to the risk * * * The better authorities, however, seem to sustain the rule that insurance experts may testify concerning the usage of insurance companies generally in charging higher rates of premium or rejecting risks when made aware of the fact claimed to be material."

See, also, page 186 of the California case concerning the fact that a warranty excludes all argument of

reasonableness. The court also indicates that the question of materiality may be a question of fact. (See page 189.)

In *Home Life Insurance Company v. Myers,* 112 Fed. 846, 8th Circuit, an insurance policy was issued in consideration of the application and the application was made a part of the policy. In the application it was agreed by assured that the answers were warranted to be true and were offered in consideration of the contract. The assured stated that no proposition for insurance had been made in any other company nor was any pending. The court said:

> "This was a material matter about which the company might reasonably require information and upon which its action might reasonably depend. It was deemed so material by the company that it required from the insured a warranty of the truth with respect to it; and the insured, for the purpose of securing the policy, was willing to make and did make the warranty as required. This agreement, relating as it does to a matter obviously proper and material for consideration by the insurance company in determining whether it would accept the proposition for insurance on the life of the insured, would be enforcible even if it were not made the subject of special warranty; but, being so made, it comes fully within the principles announced in many cases and must be enforced."

The question as to whether there have been any previous cancellations was held material in the case of *Wyss-Thalman v. Maryland Casualty Co.,* 193 Fed. 55.

See, also, *Taylor v. American Liability Co.,* 48 Fed. (2d) 592, 6th Circuit, and in *Maryland Casualty v. Eddy,* 239 Fed. 477, 6th Circuit, it was said concerning such a statement:

> "Under this situation, there is no room to deny that the misrepresentation was not only most deliberate and intentional, but that they both knew it to be material. Such a situation presents no question of fact for the jury, and materiality of such a statement is apparent as matter of law."
>
> *Phoenix Co. v. Raddin,* 120 U. S. 183 at 189, 30 L. Ed. 644.

In *Snare v. St. Paul,* 258 Fed. 425, it is held that mere inquiry by the insurance company established the materiality.

In *Couch Cyc. of Insurance Law,* Vol. 4, page 2850, it is said:

> "Again, where the contract expressly provides that the answers to written questions are offered as an inducement to issue a policy, they are material as a matter of law, especially where they relate to facts within the knowledge of applicant and not within the knowledge of the insurer."

Citing:

> *Mutual Insurance Co. v. Leahsville,* 172 N. C. 534, 90 S. E. 574.

See, also:

> *Standard Insurance Co. v. Sale,* 121 Fed. 664.

In *Taylor v. American Liability Co.,* 48 Fed. (2d) 592, the schedules of warranty were made a part of the policy. It was said in one of these that no cancella-

tions had been made in the past three years. No exceptions. The court said:

> "It is not disputed that these representations were material to the risk and that the answers were false. The defense is that the soliciting agent made no inquiries whatever with reference to this subject-matter, but himself inserted the answers, knowing them to be false, and that the insured did not read the policy nor know of the representations which he was apparently charged with making. This defense cannot prevail." (Citing cases.)
>
> "The policy-holder is held strictly to knowledge of the contents of his policy (citing cases) and retention of it constitutes an adoption of the application and of the representations upon which such policy was issued."

It was also held that fraud of the agent would prevent the imputation of his knowledge to the insurance company.

One of the early cases on our subject is *Jeffries v. Economical Mutual Life Insurance Co.*, 22 L. Ed. 833. The policy included the application. The statements were regarded as true and in the event that they were not the policy was to be void.

The assured made the false statement in his application that no application had been made to any other company. The court held in view of the fact that the policy was made in consideration of the statements and declarations that this representation was material. In other words, it was stipulated as to all statements, not only as to important or material statements, that the untruth in any one would render the policy void.

"The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. 'Statements and declarations' is the expression—what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the Company.

There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the Company to be deceived by it."

* * * * * * *

"So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The Company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the Company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz.: that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information

received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the Company, the question cannot be deemed immaterial."

See, also:

Subar v. N. Y. Life Insurance Co., 60 Fed. (2d) 239.

H. THE LEGAL EFFECT OF THE BREACH OF THE MATERIAL WARRANTY BY THE ASSURED.

A. A breach of warranty will avoid the policy although there is no provision to that effect in the policy. *Orient Insurance Co. v. Van Zandt-Bruce Truck Co.,* 50 Okla. 558, 151 Pac. 323. In *Allen v. Home Insurance Co.,* 133 Cal. 29, it was said:

"And if the act is done by a third person without the control of or with the knowledge or consent of the insured, the policy will be void."

And in *Equitable Life v. Keiper,* 165 Fed. 595, it was held that failure to disclose serious illness in answer to the question with a negative answer, it was held a breach of warranty and judgment was rendered for the defendant. The court held that there should have been a directed verdict for the defendant.

B. Section 2610 of the *Civil Code* says:

"The violation of a material warranty or other material provision of a policy on the part of either party thereto, entitles the other to rescind."

Section 2612 of the *Civil Code* says:

"A breach of warranty, without fraud, merely exonerates an insurer from the time that it

occurs, *or where it is broken in its inception prevents the policy from attaching to the risk.*"

Section 2580 of the *Civil Code* says:

"If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false."

Section 2583 of the *Civil Code* says:

"Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract."

In *Soloman v. Federal Insurance Co.,* 176 Cal. 133, it was held that the misstatement of the year model of an automobile and the misstatement of cost to the assured were material misrepresentations precluding recovery upon an automobile fire insurance policy, and in *Cooley's Briefs on Insurance,* page 1951, it is said:

"In view of the general principle that the materiality of the fact is wholly unessential in the case of a warranty, it is readily deduced that where there is a breach of warranty the policy is avoided, though the statement on which the breach is predicated is in no way material to the risk."

The case of *Peterson v. Manhattan Life Insurance* Co., 115 Ill. App. 421, question 68 of the application, was as follows:

"Have you ever been declined or postponed by any company?"

This question was answered "No." The court said:

> "That answer was untrue. Even if it were not a warranty but merely a representation, it was material, and if it had been answered truly would probably have lead to such an investigation as would have caused defendant to reject this application."

The court held that the defendant was not liable because of the breach of warranty.

In *Shamrock Towing v. American Insurance Co.,* 9 Fed. 2d 57 (2nd Circuit), libel dismissed for failure to comply with a promissory warranty. The court held that a warranty in a contract of insurance must be literally complied with and the questions of materiality or immateriality do not enter into it.

In *General Accident v. Industrial Accident Commission,* 196 Cal. 179, it was held that rescission was not the only remedy and that the insurer might wait and set up the fraudulent concealment as a defense to the action on the policy.

In *Georgia Casualty Co. v. Boyd,* 34 Fed. (2d) 116 (9th Circuit), it was held that under 2580 of the California Civil Code an insurance company could rescind for a false statement of the assured in the schedule whether it was a warranty or a mere representation, and that the rescission would be effective against third parties whose rights may be affected.

I. RULES OF EVIDENCE AND THE POLICY PROVISIONS PREVENT WAIVER OF BREACH OF WARRANTY.

(1) There is a non-waiver provision contained in Part II, Provision I, as follows:

> "No provision or condition of this policy shall be waived or altered, except by written endorsement attached hereto and signed by the president or secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the company unless such person, firm or corporation is authorized in writing as such agent by the president or secretary."

It is to be noted that this provision not only requires written indorsement signed by the president or secretary to be attached to the policy before there can be a waiver, but it also limits the power of its agents or any other persons to effect a waiver by reason of knowledge and also limits the power of any person to act as agent unless duly authorized in writing by the president and secretary.

Even where such a provision does not exist in a policy, there must be actual notice or knowledge of all the facts before a waiver or an estoppel will be worked.

In 32 *C. J.* 1322 this phase of the rule is stated as follows:

> "The principles of constructive notice which obtain as to alleged bona fide purchasers of real estate or negotiable instruments do not apply to the full extent in negotiations between the ap-

plicant and the company, since the company may rely on the presumption that insured has stated all the material facts and as a rule is not bound to make inquiries."

In a case involving a general agent of the insurance company, it has been held that the notice or knowledge necessary to work a waiver or estoppel must be actual.

Hare and Chase v. National Surety, 49 Fed. (2d) 447, 458.

In *Satterfield v. Malone,* 35 Fed. 445, it was held that constructive notice was insufficient and mere rumor was not enough to put the insurance company on inquiry.

See, also:

Cameron v. Royal Neighbors, 163 N. W. 902 (Mich.).

In *Landers v. Cooper,* 115 N. Y. 279, 22 N. E. 212, it was held that the mere fact that an agent was put on inquiry or might by diligence have ascertained the truth, was not sufficient and that it was not the agent's duty to ascertain about prior insurance. The court held that the plaintiff was bound to show that the agent, as a matter of fact, knew about prior insurance. The evidence showed that the agent had made a mistake of the facts and no actual knowledge was shown.

The general rule is stated in *Cooley's Briefs on Insurance,* Vol. 3, p. 2547, as follows:

"If an insurance company is to be held to have waived matters vitiating a policy, it or its

> agents must have actual notice or knowledge of such matters. Constructive notice is not sufficient."

To the same effect see page 2523, *Cooley on Insurance,* and at *2517* it is said that mere opportunity to make an examination or ascertain the facts will not charge the insurance company with knowledge.

A waiver is an *intentional* relinquishment of a *known* right. *Bank v. Maxwell,* 123 Cal. 36.

In *Hackett v. Supreme Council,* 60 N. Y. S. 806, the following headnote is borne out by the opinion:

> "The fact that a record of previous rejections is kept does not estop the insurer to take advantage of the misrepresentation, its contents or the former rejection of applicant not being known to the officers from whom the insurance was obtained."

The court also said that the plaintiff must show that the fact of previous rejection was "actually known to those officers or agents of the defendant from whom the insurance was obtained". This case was affirmed in 168 N. Y. 588, 60 N. E. 1112.

In *Desmond v. Supreme Council,* 64 N. Y. S. 406, the *Hackett* case is followed. In this case rejection had been in the same order by its medical examiner, who kept records of his rejections, and in *Orient Insurance Co. v. Williamson,* 25 S. E. 560, 98 Ga. 464, the policy was to be void if plaintiff's interest in the property was not truly stated. The plaintiff alleges that the defendants had notice, for a deed showing

the correct state of the title was on record. Plaintiff contends therefore that the misrepresentation was waived. The court held:

> "* * * but the doctrine of constructive notice (of the prior conveyance) does not apply as between it (insurance company) and the person to whom it issued this policy. It was entitled to rely upon the representations of the insured, and was not chargeable with knowledge of what was in the records."

We have already quoted at length from *Northwestern National Ins. Co. v. McFarlane,* 50 Fed. (2d) 539, holding there must be complete knowledge of all facts. This doctrine is followed in the following cases.

Christian & Brough v. St. Paul etc., 5 Fed. (2d) 489 at 490; *Thompson v. Insurance Co.,* 104 U. S. 252, 26 L. Ed. 765; *N. Y. Life v. Goerlich,* 11 Fed. (2d) 838. To the same effect was *Clements v. German Insurance Co.,* 153 Fed. 237, where the court allowed reformation of the policy as far as representations on the daily were concerned with reference to other policies known to the insurance company, but held that there was no waiver as to the policies not reported to the company. The court said:

> "As to this insurance, the court cannot find that there was any contract between the company and the insured that the policy issued should be valid notwithstanding that insurance. An additional insurance of $4,000 was a very material matter for the insurance company to know, in view of the fact that there was a large insurance

upon the property outside of the policy about to be issued. And as, under the terms of the policy, the agent had no power to waive any condition therein, and no condition could be waived without an indorsement in writing upon the policy itself, the court cannot find that the insurance company agreed that the policy in question should be valid, notwithstanding any amount of insurance that might be upon the property at the time of its issuance. This would not be giving the officers of the company credit for ordinary business sense, and would be in contradiction of the facts in the case. If we concede that Bolster did present to the agent of the company a full list of all insurance, still the agent could not bind the company, except by performing his duties according to the provisions of the policy; and, as he did not report to the company all of the insurance, it cannot be said that the insurance company made any contract with the insured that the policy issued should be valid regardless of the amount of insurance then on the property."

It can be seen from the foregoing quotation that the question of knowledge, actual or constructive, becomes immaterial where, as in our case, the policy contains a non-waiver provision known to the assured.

(2) The Federal courts give effect to non-waiver provisions. The limitations in the policy are binding on the parties.

First of all, notice of such limitations are imputed to the assured. In *Wyss-Thalman v. Maryland Casualty Co.*, 193 Fed. 55, the court said:

"Many cases could be cited to show that the warranties in the case at bar were material; that

> the provisions that no agent should have power to waive the provisions of the policy, except by writing endorsed thereon, are valid and enforcible, and that by the delivery of the policy to the assured he is put upon notice of the conditions therein expressed."

Again, in *Taylor v. American Liability Company,* 48 Fed. (2d) 592, the court said with reference to this subject where the assured alleged he did not read the policy nor know of the representations:

> "This defense cannot prevail (citing cases). The policy holder is held strictly to knowledge of the contents of his policy (citing cases), and retention of it constitutes an adoption of the application and of the representations upon which such policy was issued."

In *Maryland Casualty v. Eddy,* 239 Fed. 477, the court said:

> "No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party."

In *Northwestern National Insurance Co. v. McFarlane,* 50 Fed. (2d) 539, Ninth Circuit, Justice Wilbur quotes from *Lumber Underwriters v. Rife,* 237 U. S. 605:

> "No rational theory of contract can be made that does not hold the assured to know the contents of the instruments to which he seeks to hold the other party. The assured also knows better than the insurers the condition of his premises,

> even if the insurers have been notified of the facts."

The court indicates that the assured might get reformation in equity, but says:

> "What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms."

We again refer to *Wyss-Thalman v. Maryland Casualty Company,* 193 Fed. 55. In that case a directed verdict was granted for the defendant and a new trial was denied. The policy was issued in consideration of the statements in the schedule of warranties. The policy also said that no agent had authority to change the policy or to waive any of its provisions and that notice to the agent or any other person would not affect the waiver or change of the policy and that no change or waiver would be valid unless by written endorsement by president or secretary, and that no person could act as agent unless duly authorized in writing. It also stated that all warranties made by the assured upon acceptance of the policy were true. The schedule of warranties appeared on the face of the policy. Among the statements in the application was one to the effect that no application had ever been made for insurance nor had any ever been declined or cancelled. To this was answered, "No exceptions". It was also stated that the assured had never received indemnity for accident nor had he ever applied for accident or health insurance. All of these were proved untrue. The

plaintiff sought to show that the answers had been made by an insurance broker and not by assured and that they had been inserted without assured's knowledge or consent that they were filled in by the broker in the presence of the soliciting agent of the company and in the absence of assured. The court sustained an objection to the admissibility of this evidence for the reason that it would change the terms of the contract sued on and it was held further that it was not necessary to consider whether or not the company ever waived any of the privileges of the policy, because the ground of plaintiff's action is not waiver. The court said that the contract as it was written was affirmed by the pleadings and no question of waiver was involved. The court said that whether or not any accident insurance company had cancelled any policy of assured's was a material question. It also appeared from the same that the so-called soliciting agent prepared the policy, countersigned it and delivered it to the broker. The court said:

> "Many cases could be cited to show that the warranties in the case at bar were material; that the provisions that no agent should have power to waive the provisions of the policy, except by writing endorsed thereon, are valid and enforcible * * *"

In *Maryland Casualty v. Eddy,* 239 Fed. 477, a policy was issued in consideration of the statements in the application and the statements were made a part of the policy. The policy contained no express provisions as to the effect upon the company's liability in case any statements in the application were false,

nor did the policy declare in so many words that the statements were warranties. The assured stated that no accident policy had been cancelled. This was false. Plaintiff knew this to be false and talked with the defendant's agent concerning it. The application was made for the purpose of getting insurance to replace that which had been cancelled. The court said:

> "Under this situation, there is no room to deny that the misrepresentation was not only most deliberate and intentional, but that they both knew is to be material. Such a situation presents no question of fact for the jury, the materiality of such a statement is apparent as a matter of law. * * * It is clear to us that no reasonable man could think that the deceit practiced upon this company was unintentional or in any way excusable; but we are satisfied that upon these facts plaintiff cannot recover. Aetna Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356; *Mutual Company v. Hilton,* 241 U. S. 613, at 622; 60 L. Ed. 1202; *Mutual Company v. Powell,* 217 Fed. 565 at 568."

The court went on to say at pages 481-482:

> "It is contended here, as in the Aetna case, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited there. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded a variation of them by the agent."

In *Fischer v. London & L. Fire Insurance Co.,* 83 Fed. 807, a policy declared it would be void if gasoline were kept on the premises, usage, etc. to the contrary notwithstanding. It also said that no agent or officer,

etc. could waive any provision except as agreed and endorsed upon the policy. Gasoline was kept in violation of this. Plaintiff set up estoppel by knowledge and conduct, alleging a general custom known to the general agent and to a board of underwriters of which the insurance company was a member, the board being formed for the purpose of supervising fire insurance rates, risks, etc., and the board inspected the premises as agents for the insurance company. The question involved was stated by the court as follows:

> "There is no allegation here that the use of gasoline was the cause of the fire, or in any way brought it about; so that the simple question presented is whether the knowledge of the general agent of the fact of the assured using gasoline in the manner set out, and the further fact that the Board of Underwriters of Louisville, of which the defendant company was a member, had knowledge of the fact that the assured used, on the premises, gasoline as described, both before and after the issuing of the policy, is sufficient to make an estoppel or a waiver."

The court held that the knowledge of the general agent was of no effect because of the non-waiver clause of the policy and that the same rule applied with reference to knowledge by the Board of Underwriters.

The following cases have given effect to non-waiver provisions of policy:

Schwab v. Brotherhood, 305 Mo. 148, 264 S. W. 690, where it was held that the intent to waive must be clear or else some element of estoppel must be shown.

In *Conner v. Connecticut Fire Insurance Co.,* 291 Fed. 105, a demurrer to the plea of estoppel and waiver was sustained. The policy there had a non-waiver clause.

Similarly, in *Stipcich v. Metropolitan Life,* 8 Fed. (2d) 285, a non-waiver clause was recognized.

See, also, *Hartford v. Small,* 66 Fed. 490, where a non-waiver clause was given effect in the case of knowledge by a local agent. A good case on this subject is *Christian & Brough Co. v. St. Paul Insurance Co.,* 5 Fed. (2d) 489 at 490, holding a non-waiver provision is binding and excluding proof of waiver or proof of custom of the agents. Citing *Penman v. St. Paul Insurance Co.,* 216 U. S. 309, 54 L. Ed. 493.

The case of *Fountain & Herrington v. Mutual Life Insurance Co.,* 55 Fed. (2d) 120, says at 123:

> "The plaintiff does not seriously controvert the position that the representations were material. Its position is that the knowledge of the local agent of the truth as to the matters inquired about was imputable to the company, and that the issuance of the policy in the face of his knowledge was a waiver of the right to avoid the policy on account of the falsity of the representations. The answer to this is that notice to an agent is notice to the principal only as to matters lying within the scope of the agent's authority; and the agent here had no authority to pass upon risks, accept any representations or information not contained in the application, or waive forfeitures. And not only was the authority of the local agent thus limited; but both in the application and in the policy as issued the insured agreed upon such

> limitation. It is well settled that the courts of the United States will recognize and enforce such limitations upon the power of the agent thus brought to the attention of the insured, and that knowledge on the part of the agent in such case will not be imputed to the company or result in a waiver of conditions contained in the policy."

In California, the *Civil Code* sections have a bearing upon the notice to or knowledge of an agent:

Civil Code, Section 2306, says an agent has no authority to defraud the principal.

Civil Code, Section 2315, says the agent has such authority as the principal actually or ostensibly confers upon him.

Civil Code, Section 2318, is as follows:

> "Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority."

(3) The Federal parol evidence rule prevents a waiver of policy provisions.

The Federal cases have held that no evidence will be allowed or be admitted to show a waiver of breach of warranty where the policy contains a non-waiver provision, as in our case, upon the theory that a written contract cannot be varied by parol evidence.

The leading case on this subject is *Northern Assurance Co. v. Grandview Building Association,* 183 U. S. 308, 46 L. Ed. 213. There the policy contained a non-

waiver clause unless endorsed on the policy in writing, and it was declared that the policy would be void if there was other insurance. The plaintiff had other insurance and told the defendant's record agent of that fact, and the agent had authority to sign and issue policies and to accept risks and, in fact, accepted the risk knowing of concurrent insurance. The court held that the plaintiff could not recover and that a written contract could not be varied by parol. The case gives a comprehensive review of the authorities and contains considerable material for the point involved.

In the case of *Mutual Insurance Co. v. Hilton Green,* 241 U. S. 614, 60 L. Ed. 1202, is based upon the same principle, holding that a representation known to be false will relieve the insurance company even though the soliciting agent and medical examiner had knowledge of the misrepresentations.

We wish to call attention to the case of *U. S. F. G. v. Leong Dung Dye,* 52 Fed. (2d) 567 (9th Circuit). That was a case where the court said that fraud and deceit were the sole issues and the question whether the insured had received notice of prior cancellation was one for the jury. There is a strong dissent in the case by Wilbur, J. on the theory that you cannot vary the contract by parol. We also call attention to *Northern Life v. King,* 53 Fed. (2d) at 617, saying that the narrow issue in the *Leong Dung Dye* case was whether the assured had received notice of rejection. We feel, therefore, that the case can be discarded.

In the case of *Fidelity Phenix Fire v. Queen City Bus,* 3 Fed. (2d) 784, the non-waiver clause is recog-

nized and it is held that evidence of waiver is not competent to vary the contract.

In *Maryland Casualty v. Campbell,* 255 Fed. 437, it was held that the insurer could not be deemed to have waived a warranty in the application concerning the insured's not having received medical attention within two years, merely because its agent knew the statement to be untrue, where the policy expressly withheld such authority from the agent and provided that no waiver should be valid unless endorsed thereon and signed by the president or secretary. The writ to the U. S. Supreme Court was denied in 250 U. S. 658, 63 L. Ed. 1193.

As we have already noted, the general rule announced by the above cases has been recognized in *Northwestern National Insurance Co. v. McFarlane,* 50 Fed. (2d) 539 (9th Circuit).

See, also, *New York Life Insurance Co. v. Goerlich,* 11 Fed. (2d) 838, which holds that there is no presumption that the agent accepting the application with knowledge of insured's rejection by another company communicated the information to the insurer. The court also holds false representations concerning prior application and rejections were material as a matter of law.

Also, please see *Penman v. St. Paul F. & M. Insurance Co.,* 216 U. S. 309, 54 L. Ed. 493, which holds that a condition avoiding the policy if blasting powder is kept on the premises is not waived because the insurer's agent knew of the breach of the condition by reason of a custom among miners to keep blasting

powder in their homes and that this was so even though more than the usual rate was charged. The court based its holding upon the fact that the policy guards against any acts of waiver or change of its conditions by providing that such waiver or change must be written upon or attached to the policy.

J. THE QUESTION OF WAIVER MATTER OF GENERAL JURISPRUDENCE AND STATE LAW DOES NOT CONTROL.

There are two excellent cases upon this subject. Please see:

(a) *Hartford Fire Insurance Co. v. Nance, et al.,* 12 Federal (2d) 575 at 576. In this case there was a question as to whether or not an insurance contract could be varied by parol evidence for the purpose of asserting estoppel to insurer's defense that policy was vitiated where insured's interest was other than unconditional, it being shown that soliciting agent was informed of such condition: Held, that the question was a matter of general jurisprudence and the State law did not control.

(b) *Home Insurance Co. of N. Y. v. Scott,* 46 Fed. (2d) 10. This case held further provisions of fire policies prohibiting encumbrances were waived because local agent knew of chattel mortgage, is a question of general jurisprudence and not State law.

See also:

Aetna Life v. Moore, 231 U. S. 543, 58 L. Ed. 356;

Gill v. Mutual Life, 63 Fed. (2d) 967.

Therefore, in view of the Federal rule as applied in the leading cases of *Northern Assurance Co. of London*

v. Grandview Building Association, 183 U. S. 213 at 234-235, and *Lumber Underwriters v. Rife,* 237 U. S. 605, the admission of parol evidence to vary the terms of a prior written contract upon the theory of an estoppel is an evasion of the true rule. The contract of insurance contained the usual provisions with respect to waivers commonly known as the non-waiver clause. This is a reasonable provision and one enforcible in the Federal courts. This is a valid contract and has so been held by this court, applicable alike to waivers claimed by the insured to have been made by the principal or company as well as to waivers claimed to have been made by an agent. The minds of the parties have met upon the terms of the contract and their rights must be governed accordingly. They must be bound by all of its terms, not by parts they choose to select for controversy. See leading case, Ninth Circuit, *Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Insurance Society,* 146 Fed. 695 at 700-71. It is, of course, elementary that everyone embodies the statute of a State in his contracts. The effect of this proposition is that all of the provisions upon warranties in California become a part of the insurance contract and an express condition therein.

Please see:

Farnsworth v. Hagelin, 300 Fed. 993 at 995, 9th Circuit.

CONCLUSION.

The findings by the trial court play the most important part in this appeal. Those findings were based upon substantial evidence, in some instances conflicting, in many instances not controverted.

Second in importance is the selection of authorities applicable to the facts as found by the trial courts. Appellants seize upon evidence which *they* believed true and which the court did not believe true. They then seek to apply their cited cases to a set of facts wholly foreign to the issues on this appeal. We are concerned only with the facts found by the trial court —which are amply supported by the evidence.

The policy contained a warranty of a material fact. The assured, through his authorized agent, knew of the existence of that warranty in the policy. It was the assured's warranty. In addition, assured's agent made an affirmative representation that the warranty as written was true. This was made by assured's agent knowing it to be false; knowing of and personally acknowledging at least four prior cancellations. The policy contained a non-waiver clause, specifying the persons through whom and the manner in which policy provisions could be altered or waived. The persons through whom notice or knowledge could be imputed to the company were also limited by the policy. Its terms were agreed upon by the assured. Appellants stand in the shoes of assured.

With these facts, what authorities determine the question? The cases determinative of the soundness of the trial court's decision have already been reviewed

by us. They are cases dealing with warranties in policies—declaring that the mere falsity of the warranty avoids the obligation. They are cases dealing specifically with the effect of non-waiver provisions—giving full effect to the agreement of the parties on that subject. They are cases dealing with a misrepresentation in fact made by the assured to an agent having no actual knowledge upon the subject or having no authority to waive the breach of a warranty contained in the policy.

Clearly this is not a case in which fraud is an issue. In simplified form it is a case involving these questions:

1. Was there a warranty in the policy?
2. Was the warranty material?
3. Was it breached?
4. Was the breach of the material warrranty waived in the manner agreed upon by the parties?
5. Could there be a waiver in any other manner?
6. Was there a waiver in any form?

Secondary issues are:

1. Was there a misrepresentation by assured's authorized agent?
2. Was the misrepresentation relied upon by appellee?

The findings themselves resolve all these questions in favor of the appellee insurance company. The authorities give full support to the court's decision.

Under the findings and under the law the judgment of the trial court should be affirmed in every particular. There can be no conflict among the authorities on the rule of law to be applied to the circumstances found in this case.

Dated, San Francisco,
October 19, 1934.

Respectfully submitted,
A. E. Cooley,
Louis V. Crowley,
Frederic E. Supple,
Attorneys for Appellee.

No. 7394

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT Z. EDDY, ALBERT P. EDDY, RAYMOND E. EDDY and GLADYS KANE,

Appellants,

vs.

NATIONAL UNION INDEMNITY COMPANY (a corporation),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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Subject Index

Table of Authorities Cited

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We submit this petition for a rehearing of the foregoing case because in our opinion the decision of this Court in affirming the judgment of the lower Court was based upon a misapprehension concerning certain facts of the case and the law applicable to them. We respectfully call attention to pages 21-23 of appellants' brief for a concise statement of some of the pertinent and undisputed facts of the case.

The Court erred in holding that there were any more than two prior policies of insurance cancelled before the appellee issued its first policy of insurance.

In its decision this Court approved the finding of the trial Court that five policies of insurance had been cancelled on Dr. Carfagni before the appellee company had issued its first policy to him. The evidence however only supports the finding that two prior policies had been cancelled, and that the appellee had actual notice of both of these prior cancellations at the time it issued its first policy to the assured. This fact is important because this Court at the end of its opinion refused to consider whether the appellee by its conduct in arranging for the repair of Dr. Carfagni's car after knowledge of its right to rescind, waived the warranty as to prior cancellations of insurance. It was declared that the conduct of the appellee was prior to knowledge "of the three of the five cancellations" and so this Court held that "if any waiver resulted from such acts it was a waiver only as to the two cancellations known to the insurance company". We urge that the conduct of the appellee was a waiver as to the two cancellations known to the insurance company and that the evidence only supports the finding that there were two such cancellations.

It is true that one of the witnesses testified in the manner related by the Court in its decision with respect to the relation between "cancellation" and "replacement" of a policy. It might be noted, however, that the same witness (Tr. p. 80; p. 62) declared

that neither the Travellers Insurance Company nor the Washington Underwriters cancelled their policies although this Court included these two "cancellations" among the three cancellations which were alleged to have been unknown to the appellee company when it issued its first policy to Dr. Carfagni. The same witness likewise contradicted that part of his testimony which this Court quoted in its decision, when he declared that the only company which, according to his record, cancelled its policy was the Home Accident Company. (Tr. p. 81.)

With the exception of the testimony of Mr. Payne, quoted by this Court in its opinion, the record is free of any evidence that there were any cancellations other than the two of which the appellee company had actual knowledge when it issued its first policy to Dr. Carfagni. The quoted evidence of Mr. Payne does not support a finding that any cancellation, other than those two which were known to the appellee, took place. In order for a policy to be effectively cancelled, it must be terminated in the manner prescribed by the policy itself, otherwise an attempted cancellation is of no avail. A cancellation, therefore, cannot be established merely by having a witness mention that "it was cancelled" because such a declaration is only a conclusion of law. If the rule were otherwise an insurance company could merely produce an agent who would say that a policy "had been cancelled" and would establish a termination even though it had failed to conform with the requirements of the policy as to the mode of cancellation. In support of this contention we submit the following authorities

which, in each respective case hold that the declaration set forth under it was a mere conclusion of law and of no legal effect:

Dutch Flat Water Co. v. Monney, 12 Cal. 534.

That an agreement was forfeited.

Phinney v. Mutual Life Insurance Co., 67 Fed. 493.

That a contract was abandoned and rescinded.

McNulty v. Richmond Land Co., 44 Cal. App. 744,

and

Russell v. Cripple Creek Bank (Colo. 1922), 206 Pac. 160.

That a contract was in full force and effect.

W. H. Swanson Co. v. Pueblo Opera Co. (Colo. 1921), 197 Pac. 762.

That a lease had expired.

Hodges v. Lyon (La. 1923), 98 So. 49.

That a sale had been ratified.

Wardman v. Hutchins, 63 Fed. (2d) 892.

That a rescission had been elected.

Prichard v. Kimball, 190 Cal. 757.

That an instrument was invalid.

Rushton v. Reeve, 178 Cal. 199.

That a judgment had been fully "vacated, ordered and set aside".

Safe Deposit & Trust Co. v. Tait, 54 Fed. (2d) 383.

That a transfer was void.

Goltra v. Inland Waterways Co., 49 Fed. (2d) 497.

That a lease had been unlawfully terminated.

Day-Gormley Co. v. National City Bank, 8 Fed. Supp. 503, 73 Fed. (2d) 910.

That an interest in an account had been divested.

As a consequence the appellee cannot contend that it established that there were cancellations other than the two of which it had actual notice, merely by reason of the gratuitous statement of a witness that other policies had been "cancelled". Moreover, this Court was not justified in approving the finding that the "replacements" as explained by Mr. Payne in the testimony quoted in the decision of this Court, "were cancellations within the meaning of the warranty against cancellations of the policy in suit".

According to the unchallenged testimony of Mr. Payne, the mode of "replacement" was for the company to telephone or write to the broker and to ask him to place the policy elsewhere in order to avoid necessity of cancellation. It has been held that such an expression of desire or intention to cancel or a request to place insurance elsewhere does not constitute cancellation, and this Court was not justified in considering it the equivalent of cancellation.

In the case of

Beaumont v. Commercial Casualty Co. (Mich. 1928), 222 N. W. 100,

the company wrote to the plaintiff asking that he

> "kindly endeavor to procure this insurance with some other company by November 1st at which time we would like to be relieved."

The Court allowed recovery to the plaintiff who had sustained a loss thereafter, and in holding that there had been no cancellation used the following language:

> "Notice of cancellation of an insurance policy must be according to the provisions of the policy and be peremptory, explicit, and unconditional. American Fidelity Co. v. R. L. Ginsburg Sons' Co., 187 Mich. 264, 153 N. W. 709. It is not sufficient if it is equivocal or merely states a desire or intention to cancel. 14 R. C. L. 1009."

In all of the following authorities, it has been held that even notice to the insured himself of desire, or intention to cancel does not constitute a cancellation.

14 *R. C. L.* 1009;

Clark v. Insurance Co. of North America, 89 Me. 26, 35 Atl. 1008;

Savage v. Phoenix Ins. Co., 12 Mont. 458, 31 Pac. 66;

Davidson v. German Ins. Co., 74 N. J. L. 487, 65 Atl. 996;

Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309;

John R. Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84.

It is well settled that even unequivocal peremptory notice in writing to a broker that a policy is cancelled does not constitute an effective cancellation, because

> "the agent has no power, after the policy is so delivered, to consent to a cancellation, or to accept notice of an intended cancellation by the insurer."

The foregoing language is quoted from 14 *R. C. L.* page 1011 where a long list of authorities is set forth,

in addition to the cases which we cite presently. As a consequence this Court was not justified in holding that the procedure outlined in the quoted testimony of Mr. Payne constituted a cancellation in law or in fact.

It was not for Mr. Payne to declare whether prior policies had been "cancelled" but the question of cancellation was a matter of fact to be proved only by evidence that the various companies had followed the procedure for cancellation prescribed in their respective policies. Mr. Payne in his quoted testimony described "replacements" as being informal notices to the broker to replace insurance with another company, which of course does not constitute a "cancellation" in any legal sense.

In the case of

Grace v. American Central Ins. Co., 109 U. S. 278, 27 L. Ed. 932,

an insurance broker was orally notified by the company that the company refused to carry the risk any further. The insurer demanded the return of the fire insurance policy, and the broker notified the company that the policy would be returned to it. Shortly thereafter the property upon which the fire insurance policy was issued, was destroyed. In allowing recovery upon the policy the Supreme Court of the United States declared that the authority of an insurance broker ceased upon the execution of the policy, and that the policy had not been cancelled because notice to a broker "of its termination by the company was not notice to the insured".

In the case of

White v. Insurance Co. of New York, 93 Fed. 161,

it was held that

"the fact that an insurance broker was authorized to procure insurance does not make him the agent of the insured to receive notice of the cancellation of the policies."

In the case of

Kehler v. New Orleans Insurance Co., 23 Fed. 709,

it was held that

"notice from the company to the broker who procured the policy, of an election to terminate the insurance was not notice to the assured."

In order to avoid repetition we direct the attention of this Court to pages 135 and 136 of appellants' brief which contain numerous authorities explicitly holding that notice of cancellation when given to an insurance broker does not operate as a cancellation of the policy.

Moreover, we urge upon the Court the following cases, all of which hold that an attempted cancellation in order to be effective must be in strict conformity with the manner of cancellation set forth in the policy.

See:

Filkins v. State Assurance Co., 8 Fed. (2d) 389;

Magruder v. U. S., 32 Fed. (2d) 807;

Beaumont v. Commercial Casualty etc. Co. (Mich. 1928), 222 N. W. 100;

Spring etc. Co. v. Parker (Mo. 1927), 289 S. W. 967;

American Fidedity Co. v. Ginsberg (Mich. 1927), 153 N. W. 709.

There was therefore no justification for the finding that any policies of prior insurance had been cancelled save those two policies of which the appellee had actual knowledge at the time it issued its policies to Dr. Carfagni, even if an actual notice of cancellation had been served on the broker. The only evidence to support such a finding is based upon alleged conclusions of a witness whose testimony was quoted in the opinion of this Court. Therefore, it is necessary for this Court to pass upon the question set forth in the last three paragraphs of its decision in this case with respect to the effect of the conduct of the appellee in incurring a bill for the repair of Dr. Carfagni's car after having had knowledge of the two prior cancellations.

We again call attention to the confusion that led the trial Court into the belief that more policies of insurance were cancelled on Dr. Carfagni than was actually the fact. From Plaintiffs' Exhibits 9 and 10 (Tr. p. 232; p. 236) it will be observed that on October 5, 1928, the Pacific Employers Insurance Company issued policy No. 26543 upon Dr. Carfagni's automobile. This was one of the policies of which the appellee had actual notice of cancellation. The transcript further reveals (p. 63) that on October 5, 1928, the same date, the Western States Insurance Company issued a policy bearing the same number 26543 to Dr. Carfagni on the same automobile. The identity of numbers and dates of inception reveal that these two policies were the same, and that the error probably arose out of the incorrect code letter on Plaintiffs' Exhibits 9 and 10.

Furthermore, the evidence shows that on October 6, 1928 (Tr. p. 71), the Washington Underwriters issued Policy No. 26503 on the automobile owned by Dr. Carfagni.

The trial Court erroneously concluded that three separate policies had been cancelled on Dr. Carfagni respectively by the Pacific Employers Company, the Washington Underwriters Company and the Western States Company, and that the appellee at the time it issued its first policy to Dr. Carfagni had no knowledge of any of these three cancellations.

All of these three companies had Mullin & Acton as their general agents. (Tr. p. 238; p. 231.) The identity of dates of inception and numbers proves that the Pacific Employers policy (Plaintiffs' Exhibits 9 and 10), and the Western States policy were the same. Furthermore, according to the uncontradicted evidence of Mr. Breeden, who is employed by the appellee, the Western States was merely general agent for the Washington Underwriters. (Tr. p. 238.) As a consequence the Court was in error in assuming that each of these policies represented a separate cancellation in a different company.

This Court misconstrued the argument set forth in subdivision X of appellants' brief with respect to the effect of Section 633(d) of the Political Code of California.

In its opinion this Court apparently assumes that appellants contend that Section 633(d) of the California Political Code conflicts with the terms of the policy with respect to the limitation of an agent's au-

thority to waive the provisions of a policy. It is our contention that Section 633(d) of the California Political Code giving the local agents of an insurance company the exclusive authority to approve risks and to countersign policies, enhanced the dignity of the local agents so that their knowledge constituted knowledge of the company itself and enabled them to waive provisions of the policy even in the absence of written authority. This contention, we believe, is completely sustained by the authorities contained between pages 96 and 111 of appellants' brief, showing that such an effect has been given to the authority of agents in cases involving similar policies issued in states having like statutes.

The finding that the appellee company itself knew of the prior cancellations renders it unnecessary to consider the limitation of the authority of an agent.

Between pages 71 and 96 of appellants' brief the distinction is made between a case in which only an agent knew of the facts constituting grounds for the alleged cancellation and where, as here, the Court found that the *appellee company itself* knew of the alleged grounds for cancellation at the time the policy sued upon was issued. In its decision this Court proceeded upon the assumption that only the knowledge of an agent of limited authority was involved, instead of the knowledge of the appellee company itself. The authorities which we cited illustrating the distinction between the knowledge of an agent and the knowledge of the company itself, make the ques-

tion of the limitation of the agent's authority immaterial in this case and justify a rehearing.

CONCLUSION.

The statement of facts set forth in the opening paragraphs of appellants' brief compels the conclusion that the equities of this case are overwhelmingly on the side of the appellants who had no hand in the procurement of the original policy, and who are only seeking to recover from the insurance company payment of a judgment which they obtained against Dr. Carfagni, the insured. In the light of the authorities cited at pages 51 and 52 of appellants' brief setting forth the rule that a construction of a policy which will avoid forfeiture is to be favored if such a construction can be reasonably given, we submit that this Court should allow a rehearing of this case.

Dated, San Francisco,
July 29, 1935.

Respectfully submitted,
SULLIVAN, ROCHE, JOHNSON & BARRY,
THEO. J. ROCHE,
EDWARD I. BARRY,
EUSTACE CULLINAN, JR.,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 29, 1935.

EUSTACE CULLINAN, JR.,
Of Counsel for Appellants and Petitioners.

No. 7454

United States

Circuit Court of Appeals

For the Ninth Circuit.

ASA B. CUTLER and FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

Appellants,

vs.

FLOYD J. COOK,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States For the District of Oregon.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 7454

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

JAMES G. WILSON and
JOHN F. REILLY,
Platt Building, Portland, Oregon,
for Appellants.

OMAR C. SPENCER,
FLETCHER ROCKWOOD, and
CAREY, HART, SPENCER & McCULLOCH,
Yeon Building, Portland, Oregon,
for Appellee.

In the District Court of the United States for the District of Oregon.

November Term, 1930.

BE IT REMEMBERED, That on the 22nd day of January, 1931, there was duly filed in the District Court of the United States for the District of Oregon, a Transcript of Record on removal from the Circuit of the State of Oregon for Multnomah County, and contained in said Transcript is a Bill of Complaint, in words and figures as follows, to-wit: [4*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the Circuit Court of the State of Oregon
for the County of Multnomah.

No. P-2487.

FLOYD J. COOK,

Plaintiff,

vs.

ASA B. CUTLER and F. W. CUTLER, individually and as partners doing business under the name of CUTLER MANUFACTURING CO.; CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation; FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as the John Bean Manufacturing Co.; F. W. CUTLER, Director, General Agent, and Attorney in Fact within the State of Oregon for Food Machinery Corporation; and CUTLER MANUFACTURING COMPANY, a division of Food Machinery Corporation,

Defendants.

BILL IN EQUITY.

COMES NOW the plaintiff and, as ground for this suit in equity, alleges:

I.

That about the year 1925 plaintiff conceived and commenced construction of a fruit grader and sorter that would accomplish uniformity of sizing and of bin distribution in the packing of fruit; and by the

season of 1926-1927 plaintiff's said fruit grader, as the result of the construction of four or more machines by plaintiff, had come into use as a practical and workable machine.

II.

That on October 25, 1927, plaintiff was granted by the United States of America, letters patent No. 1646951 for his invention, design, plan, and process for the sorting of fruit, known and designated as Cook Fruit Graders and Sorters, used in the packing business; and thereafter and on the 4th day of December, 1928, obtained a reissue of the same, No. 17149.

III.

That at the dates above set forth, and at all times subsequent, the plaintiff was and is the sole owner of the invention, scheme, and plan of construction, use and operation, according to the [5] principle and theory in said patent set forth, of and for Cook Graders.

IV.

That on May 4, 1928, and prior thereto, plaintiff was manufacturing and selling said graders for the packing trade successfully and profitably and in competition with defendants F. W. Cutler and Asa B. Cutler and the Cutler Manufacturing Co., partnership; and the said Cook Grader was preferred by those in the packing trade.

V.

That the defendants F. W. Cutler and Asa B. Cutler, in order to eliminate competition and to procure plaintiff's machine, enterprise, and business, with the right to use his said invention, sought out and solicited this plaintiff for the exclusive and only manufacture and sale of said fruit grader of plaintiff, together with his designs, plans, and materials then connected therewith, and the business of this plaintiff as then conducted by him, to the end that Cutler Manufacturing Co., partnership, might become possessed of all the business of plaintiff comprehended in the exclusive making of Cook Fruit Graders.

VI.

That to accomplish their purpose, the defendants Cutler Brothers represented that they controlled the fruit grader production through their extensive organization in Portland and their other associates then in the trade, and that they could and would procure large-scale production and sales of plaintiff's fruit grader, and that with their big shop and facilities they could and would more efficiently and with larger profit produce and sell machines of plaintiff's type in large quantity and that they would and could do more with their organized manufactory and going business than plaintiff could do as he then was doing and that they desired plaintiff's machine, and that if plaintiff did not yield to their solicitation and persuasion by allowing them, the said Cutlers, to make and sell plaintiff's machine, that they would

make one so similar in principle and performance as to interfere with plaintiff's trade and nullify his patent rights.

VII.

That plaintiff, believing their said representations, and being influenced by their threat of patent-right interference, placed [6] himself in full reliance upon the said Cutlers and gave them the exclusive right to make and sell his machines for the term beginning May 1, 1928, up to and including September 30, 1933, subject to certain considerations and royalties, agreed upon between the parties, and as promised then by the Cutlers to be observed, performed and paid by them.

VIII.

That plaintiff at all times mentioned herein, believed that the Cutlers would do and perform for the advancement and interest of plaintiff's said machine if plaintiff, upon the terms they, the Cutlers, demanded, allowed the making and sale of his said machine; and not knowing or having any cause to know that the Cutlers would not do so, plaintiff, in full confidence in them, turned over his entire business to them.

IX.

That during the times hereinbefore mentioned, and at all subsequent times, said Cutlers intended to undermine and destroy plaintiff's machine and his business to the end that the grader and sorter made then by plaintiff should and would not be maintained in the trade; and the acts and representations of the

Cutlers upon which plaintiff then relied were designed to enable them to suppress his product in order that they might the better put out such machine as they themselves or their associates in the business might select.

X.

That as a vital part of the consideration to plaintiff for his grant of the said exclusive license, the defendants F. W. Cutler and Asa B. Cutler, then doing business as Cutler Manufacturing Co., a partnership, promised and agreed that the said company, during the time that the said exclusive license remained in force, would not manufacture any fruit grading machines of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manufactured by the said company on May 4, 1928, and at that time they were not making any grading machine of the kind, nature or similar in function or principle to the Cook Grader.

XI.

That as a vital part of the consideration of the grant of the exclusive right to make and vend Cook Graders, the said defendants F. W. Cutler and Asa B. Cutler, partners as Cutler Manufacturing Co., [7] did then promise and agree that at the expiration or earlier determination of the license, plaintiff should have the exclusive right and ownership in all improvements, attachments, and designs relating to said Cook Grader and attachments developed thereafter, whether the same should have

been made by the Cutlers or Cutler Manufacturing Co., or by plaintiff, upon payment by plaintiff of the expense of the application for patent made necessary by such improvement, attachment, or design.

XII

That some time after they obtained control of plaintiff's aforesaid machine, enterprise, and business, defendants F. W. Cutler and Asa B. Cutler, partners as Cutler Manufacturing Co., then changed and altered the plaintiff's aforesaid fruit grader contrary to his designs by adding contrivances and modifications of their own conception, different in principle, in function, design, and scope than plaintiff's machine, and did wholly change and alter the plaintiff's said fruit grader as made and patented by plaintiff as to impair, and said changes, alterations, contrivances, and modifications made by Cutlers and Cutler Manufacturing Co. did impair the efficiency, usefulness, and satisfactory operation of said Cook Grader, and did render the trade and demand therefor utterly valueless to themselves and to the plaintiff, and did destroy the trade success and demand plaintiff theretofore had himself builded for his own machine, and did thereby limit and circumscribe the amount of royalty and earnings accruing to plaintiff under said license to the said defendants F. W. Cutler and Asa B. Cutler as Cutler Manufacturing Co.

XIII

That notwithstanding that they acquired the business of plaintiff in such manner and became licensees of plaintiff, F. W. Cutler and Asa B. Cutler, as Cutler Manufacturing Co., partnership, then set about to and did acquire certain rights and interests which they claimed to be adverse to plaintiff, under a patent called the Palmer Patent, No. 1251093, of December 25, 1917, which, as they claimed, threatened, and asserted, by obtaining, they could modify the plaintiff's machine without plaintiff's consent and adverse to the rights and powers under the license originally granted to them by plaintiff, and whereby, pursuant to the obtaining of [8] said Palmer patent, they altered, modified, and entirely changed the construction, use, and operation of the Cook Grader as acquired from plaintiff to a principle entirely different from that conception of the machine as licensed to them under plaintiff's said invention and patent, and builded a machine entirely different and less efficient than plaintiff's.

XIV.

That during all the times herein mentioned and up to the time that defendants Cutlers and Cutler Manufacturing Co., partnership, changed the design, plans, machine, and its construction, use, and operation, plaintiff's machine, known as the Cook Fruit Grader, was desired as an efficient, operative instrument in the sorting of fruit in the packing trade, and continued so to be until the defendants Cutler Brothers and Cutler Manufacturing Co.

changed the same, wherefrom and thereafter Cutlers and Cutler Manufacturing Co., partnership, became aware and knew that the machine that they had constructed in violation of their said license and against the interests of plaintiff then was and became a machine not as efficient, useful or desired by the packing trade as the machine of plaintiff that they had licensed; and in violation of their said license right and against the interests of this plaintiff said Cutlers and Cutler Manufacturing Co. did make and vend a machine so different in design, construction, use, and operation from plaintiff's machine as to endanger and damage the plaintiff, causing the diminution of royalties, business, and returns that could and would have been built up and maintained for plaintiff had Cutlers and Cutler Manufacturing Co., partnership, continued to make and sell the machine of this plaintiff, as they had promised to do.

XV

That to enable plaintiff to determine the royalties that were due him under the license agreement, said defendants Cutler Brothers and Cutler Manufacturing Co., partnership, promised and agreed to deliver to plaintiff by the 15th day of each month, beginning June 1, 1928, and continuing during the life of the license agreement, a written statement showing the amounts of sales, if any, during the preceding calendar month, names and addresses of purchasers, and size and character of equipment shipped, and/or delivered during such calendar

month; that said de- [9] fendants have altogether failed to comply with this promise and agreement; that plaintiff does not know the facts himself and cannot allege them; and plaintiff has demanded said information but has not received the same.

XVI

That at the time the exclusive license was granted to F. W. Cutler and Asa B. Cutler and Cutler Manufacturing Co., partnership, it was agreed by the parties that if during the term of the license agreement the company should sell its business, plaintiff should have the option either to require that the purchaser from the company should assume and discharge all the company's obligations under the license agreement or to cancel and determine the agreement and put an end to all the company's rights thereunder and prevent any rights thereunder from passing to such purchaser from the company.

XVII.

That on or about November 29, 1929, defendants Cutler Brothers and Cutler Manufacturing Co., copartnership, incorporated under the laws of the State of Oregon under the name of the Cutler Manufacturing Company, Inc., defendant herein, and took over the business and assets of the said Cutlers and Cutler Manufacturing Co., copartnership; that the defendant Asa B. Cutler was and now is its president and director, and defendant F. W. Cutler was and now is its vice-president and director.

XVIII.

That some time in the fall of 1929 or early in 1930, the defendants F. W. Cutler and Asa B. Cutler, the Cutler Manufacturing Co., copartnership, and the Cutler Manufacturing Company, corporation, were merged, combined and associated with and became a division of defendant Food Machinery Corporation in accordance with negotiations between said parties defendant, which had continued over a period of months and years immediately prior thereto; and defendant F. W. Cutler was and now is a director of the defendant Food Machinery Corporation and was and is now, by appointment, the attorney in fact and general agent within the State of Oregon for said Food Machinery Corporation; and Cutler Manufacturing Company, a corporation, did from said time hold itself out and now holds itself out to be a divisional unit of said Food Machinery Corporation. [10]

XIX.

That on or about February 27, 1929, defendant Food Machinery Corporation, then known as the John Bean Manufacturing Company, contracted to obtain and did obtain the exclusive right to make and sell what are known as Clear Fruit Graders, which are used in the packing business in competition with plaintiff's said Cook Fruit Grader and that said exclusive rights to make and use Clear Fruit Graders are now possessed by defendant Food Machinery Corporation with which defendants F. W. Cutler and Asa B. Cutler are now identified and

associated; and all the defendants participate and share in said business and the profits thereof.

XX.

That on July 26, 1930, plaintiff served written notice on all of said defendants named herein, in and by which plaintiff did require them and each of them to perform, observe, and execute the provisions and agreements made and provided in the license relating to the said Cook Grader; and that none of said defendants or any of them have performed or kept said provisions and agreements or complied with said notice; that their failure so to do now causes and has caused irreparable injury and damage to plaintiff in many thousands of dollars, as an accounting of which, if taken, will show.

XXI.

That plaintiff has fully performed and kept all conditions, considerations, and requirements stipulated to be performed by him, and has not cancelled nor breached the exclusive license agreement made between the parties herein.

XXII.

That the aforesaid acts and doings of the defendants, both severally and in combination and confederation with each other, as hereinbefore set forth, have caused and do now cause irreparable and continuing injury and damage to plaintiff in the making and selling of his fruit graders and in the business arising out of and connected therewith, as herein specified and alleged, and in the

use and enjoyment of plaintiff's invention and patent rights; and the acts of defendants as alleged have damaged and hurt plaintiff by causing the impairment and [11] loss of the use and sale of his said invention and the issues and profits rightly to be earned and paid under the terms of the agreement that defendants, as alleged, have failed to observe and keep.

XXIII.

That plaintiff has no plain, speedy, adequate, and complete remedy at law for the prevention of the frequent and recurring injuries and/or the redress of the wrongs alleged herein; and that frequent and numerous proceedings against plaintiff and/or against these or other defendants would occasion a multiplicity of actions and suits without any complete or adequate relief; and to prevent these things plaintiff brings this suit.

WHEREFORE, plaintiff prays the Court for the following relief;

1. That said defendants and each and every one of them be required to account to plaintiff for any royalties and profits which now or at any time have or might properly have accrued as the result of the manufacture and sale of Cook Fruit Graders: and to furnish written statements showing the amount of such sales, if any, the names and addresses of purchasers, and the size and character of equipment sold and/or shipped, and the dates thereof.

2. That defendants F. W. Cutler and Asa B. Cutler be required to inform the plaintiff and this

Court as to what fruit grading machines that are claimed, or that they will or might claim or assert, are of the same nature and for the same purpose as the said Cook Grader, were being manufactured by defendants F. W. Cutler and Asa B. Cutler, partners as Cutler Manufacturing Co., on May 4, 1929, or thereafter.

3. That defendants be required to pay plaintiff for any and all damage suffered by plaintiff by the acts and doings of defendants in connection with the manufacture and sale of Cook Fruit Graders either as they claim under the exclusive license agreement, or contrary thereto or in violation of the provisions thereof, as alleged herein by plaintiff.

4. That defendants F. W. Cutler and Asa B. Cutler and the Cutler Manufacturing Co., partnership, be enjoined from manufacturing any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as are found by the Court to have been manufactured by them on May 4, 1928.

5. That defendant Cutler Manufacturing Company, corporation, be found by this Court to stand in the position of assignee of the exclusive [12] rights granted by plaintiff to defendants F. W. Cutler and Asa B. Cutler, doing business as Cutler Manufacturing Co., copartnership, and is and has become bound by provisions of the exclusive license agreement.

6. That if plaintiff's fifth request is found for plaintiff, defendant Cutler Manufacturing Company, a corporation, then be enjoined from the manu-

facture and sale of any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manufactured by Cutler Manufacturing Co., copartnership, on May 4, 1928.

7. That if it be found by this Court that defendant Cutler Manufacturing Company, a corporation, is not personally bound by the terms of the original license agreement, said defendant Cutler Manufacturing Company, a corporation, be enjoined from manufacturing any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manufactured by defendant Cutler Manufacturing Co., a copartnership, on May 4, 1928, so long as defendants F. W. Cutler and Asa B. Cutler are connected or identified therewith.

8. That defendant Food Machinery Corporation, a Delaware corporation, be found by this Court to stand in the position of assignee of the exclusive rights granted by plaintiff to defendants F. W. Cutler and Asa B. Cutler, doing business as Cutler Manufacturing Co., copartnership, and is now and has become bound by the provisions of the exclusive license agreement.

9. That if plaintiff's eighth request is found for plaintiff, defendant Food Machinery Corporation then be enjoined from the manufacture and sale of any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manu-

factured by Cutler Manufacturing Co., copartnership, on May 4, 1928.

10. That if it be found by this Court that defendant Food Machinery Corporation is not personally bound by the terms of the original license agreement, defendant Food Machinery Corporation be enjoined from the manufacture of any fruit grading machines of the same nature and for the same purpose as the said Cook Grader except such grading machines as were being manufactured by the Cutler Manufacturing Co., copartnership, [13] on May 4, 1928, so long as defendants F. W. Cutler and Asa B. Cutler continue to participate in or are connected or identified with said Food Machinery Corporation or any division or subdivision thereof.

11. That the Court declare that plaintiff is entitled to all improvements, attachments, and designs relating to the said Cook Grader developed subsequent to May 4, 1928, whether the same were made by defendants Cutlers or by plaintiff, upon payment by plaintiff of the expense of application for patent which may have been made by defendants Cutler Brothers in obtaining and perfecting an improvement, attachment, or design relating to said Cook Grader, if any.

12. That the Court award plaintiff his costs and disbursements in this suit.

13. That the Court grant plaintiff such different, other further, and additional relief, both

general and special, as to the Court may seem just, equitable, and right.

W. C. BRISTOL
WM. L. GOSSLIN
Attorneys for Plaintiff.

State of Oregon
County of Multnomah—ss.

I, Floyd J. Cook, being first duly sworn, depose and say that I am the Plaintiff in the above entitled suit; and that the foregoing Complaint is true as I verily believe.

FLOYD J. COOK

Subscribed and sworn to before me this 17th day of December, 1930.

[Notarial Seal] WM. L. GOSSLIN
Notary Public for the State of Oregon. My Commission Expires November 14, 1934.

[Endorsed]: Filed Dec. 17, 1930. [14]

AND AFTERWARDS, to-wit, on the 12th day of February, 1931 there was duly filed in said Court, an Answer of Asa B. Cutler and F. W. Cutler, in words and figures as follows, to-wit: [15]

[Title of Court and Cause.]

ANSWER OF ASA B. CUTLER, F. W. CUTLER AND CUTLER MANUFACTURING CO., A PARTNERSHIP.

Come now the defendants, Asa B. Cutler and F. W. Cutler, individually and as partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and for answer to the plaintiff's bill of complaint, admit, deny and allege as follows, to-wit:

I.

Answering Paragraph I of said complaint said defendants deny that they have any knowledge or information sufficient to form a belief as to whether or not about the year 1925 plaintiff conceived and commenced the construction of a fruit grader and sorter, and therefore deny the same; admit that plaintiff had constructed one or more machines, but deny that they have any knowledge or information sufficient to form a belief as to whether or not plaintiff had constructed four or more [16] machines, and therefore deny the same, and deny that by the season of 1926-1927 the said machine had come into use as a practical or workable machine.

II.

These defendants admit that letters patent of the United States No. 1646951 was issued to the plaintiff on October 25, 1927 for a machine known as Cook Fruit Grader and Sorter, and that on December 4, 1928 the plaintiff obtained a re-issue of said patent, said re-issue being numbered 17149, and with reference thereto these defendants allege that the said re-issue of said patent was secured by the plaintiff at the suggestion of the defendants Asa B. Cutler and F. W. Cutler because the claims under the original patent issued to the said plaintiff were not in the opinion of said defendants Cutlers broad enough to amply protect the said plaintiff.

III.

Admit Paragraph III of plaintiff's complaint.

IV.

These defendants deny that said plaintiff was manufacturing or selling said graders for the packing trade successfully or profitably, or in competition with the said defendants Cutler and Cutler Manufacturing Co., a partnership, and deny that the said Cook Grader was preferred by those in the packing trade, but admit that the plaintiff had manufactured and sold one or more, but not to exceed four, of said graders prior to the 4th day of May, 1928.

V.

These defendants deny that the said F. W. Cutler and Asa B. Cutler, or either of them, in order to

eliminate competition or otherwise, or to procure plaintiff's machine, or enterprise, or business, with the right to use the said plain- [17] tiff's said invention sought out or solicited the plaintiff for the exclusive or only manufacture or sale of said fruit grader of plaintiff, together with his designs, or plans, or materials then connected therewith or at all, or the business of said plaintiff as then conducted by him to the end that Cutler Manufacturing Co., a co-partnership, might become possessed of all the business of plaintiff comprehended in the exclusive making of said Cook fruit graders or to any other end, but allege that the said plaintiff solicited the said defendants Cutler on account of their having a large plant suitable for the manufacture of said machine and a large selling force and organization suitable for putting said machine on the market, to enter into a contract whereby the said defendants Cutler would manufacture and sell said machine, paying the plaintiff a royalty therefor, and as a result of such solicitation of the defendants by said plaintiff, and not otherwise, the said contract between the said plaintiff and said defendants Cutler referred to in plaintiff's complaint and hereinafter referred to, was entered into.

VI.

These defendants deny that to accomplish their purpose, or otherwise, or at all, the defendants Cutler represented that they controlled the fruit grader production through their extensive organization in

Portland, or their other associates then in the trade, or that they could or would procure large scale production, or sales of plaintiff's fruit grader, or that with their big shop or facilities, or otherwise, they could or would more efficiently or with larger profit produce or sell machines of plaintiff's type in large or any quantity, or that they would or could do more with their organized manufactury or going business than plaintiff could do as he was then doing, or that they desired plaintiff's machine, or [18] that if plaintiff did not yield to their solicitation or persuasion by allowing them, the said Cutlers, to make or sell plaintiff's machine that they would make one so similar in principle or performance as to interfere with plaintiff's trade or nullify his patent rights, and specifically deny that the said defendants Cutler, or the Cutler Manufacturing Co., a partnership, made any representations in regard to their ability or willingness to manufacture or sell said machine other than as contained in the contract of May 4, 1928 referred to in plaintiff's complaint and hereinafter referred to, and a copy of which said contract is attached to this answer, marked Exhibit I, hereby referred to and made a part hereof, and with reference thereto these defendants allege that there was no inducement on the part of the defendants to the plaintiff to enter into any contract for the production and sale of said machine other than the knowledge on the part of the plaintiff of the character of business which the said defendants Cutler

and Cutler Manufacturing Company, a co-partnership, was engaged in at said time.

VII.

These defendants deny that the plaintiff, believing their said representations or any representations, or being influenced by their threat of patent-right interference, or relying upon any representations made by the said defendants, or being influenced by any act on the part of the said defendants, placed himself in full or any reliance upon the said Cutlers, or on account of any representations of the defendants, or being influenced by any act of the defendants, gave to said defendants the exclusive right to make or sell his machine, but admit that the plaintiff and the said defendants Cutlers, co-partners as Cutler Manufacturing Co., on May 4, 1928 entered into the contract attached to this answer and marked Exhibit I, and which said contract defines the [19] full rights of the plaintiff and said defendants with reference to the right to manufacture and sell said machines and the term thereof.

VIII.

In answer to Paragraph VIII of plaintiff's complaint, these defendants deny that plaintiff at all or any times mentioned in the complaint believed that the Cutlers would do or perform for the advancement or interest of plaintiff's said machine, if plaintiff upon the terms they the Cutlers demanded or allowed the making or sale of said machine, or not knowing or having any cause to know that the

Cutlers would not do so, plaintiff in full confidence in them, or otherwise, turned over his entire business to them, and specifically deny that said plaintiff acted in said matter on any other ground or any other reason, or for any other purpose than that expressed in the contract marked Exhibit I attached to this answer, and said defendants allege that the said plaintiff relied entirely upon the terms of said contract and the considerations moving to him therefrom and not otherwise as the inducement for entering into the same.

IX.

These defendants deny that the said Cutlers at any time, or at all, intended to undermine or destroy plaintiff's machine, or his business, for any purpose whatever, and deny that any acts or representations of the Cutlers were designed to enable the said Cutlers to suppress the plaintiff's product either in order that they might the better put out such machine as they themselves, or their associates in the business, might select, or for any purpose whatever.

X.

These defendants admit that the said defendants, F. W. Cutler and Asa B. Cutler, then doing business as Cutler [20] Manufacturing Co., a partnership, agreed that said partnership during the time that said exclusive license remained in force would not manufacture any fruit grader machine of the same nature or for the same purpose as the Cook fruit grader, except such grading machines as were being

manufactured by the said company on May 4, 1928, but deny that at said time they were not making any machine of the kind or nature or similar in function or principle to the Cook grader, and with reference thereto these defendants refer to the provisions of Exhibit I attached to this answer for the full provisions of the contract and undertakings of the said parties hereto, and allege that said contract recognized the right of the said defendants Cutler and Cutler Manufacturing Co., a partnership, to sell its or their business, or to go out of business altogether during the said period, or in the event the commissions provided for in said contract for the year 1928 and the royalties accruing thereunder to October 1, 1931, did not equal or exceed the sum of $15,000.00 the said defendants Cutler and Cutler Manufacturing Company, a partnership, were not required to continue to manufacture or sell said machine.

XI.

These defendants admit Paragraph XI and the whole thereof.

XII.

These defendants deny that at any time after they obtained control of plaintiff's machine, or enterprise, or business, the defendants F. W. Cutler or Asa B. Cutler, partners as Cutler Manufacturing Co., then or at all changed or altered the plaintiff's fruit grader contrary to his designs by adding contrivances or modifications of their own conception, different in principle or function or design or scope,

than plaintiff's machine, or did [21] wholly or at all change or alter plaintiff's said fruit grader as made or patented by plaintiff as to impair the same, or that any changes or alterations or contrivances or modifications made by the said Cutlers, or the Cutler Manufacturing Company, did impair the efficiency or usefulness or satisfactory operations of said grader, or did render the trade or demand therefor utterly valueless to themselves, or to the plaintiff, or did destroy the trade success or demand plaintiff theretofore had himself builded for his said machine, or did thereby limit or circumscribe the amount of royalty or earnings accruing to plaintiff under said license to the said defendants, F. W. Cutler and Asa B. Cutler, as Cutler Manufacturing Co., and with regard thereto the said defendants allege that any and all improvements, changes, alterations or modifications of said machine made by the said defendants Cutler, or the Cutler Manufacturing Co., a co-partnership, were prior to the manufacture and/or sale of the same submitted to, approved by, and the manufacture and sale thereof with said changes, modifications or alterations were specifically assented to by the said plaintiff, Cook, and that furthermore the said defendants Cutler had the right under the said contract with the plaintiff to make modifications, improvements, attachments and designs relating to said Cook grader, subject only to that provision of Paragraph Tenth of said contract, Exhibit I hereto attached, that upon the expiration of said agreement or earlier determination the said

plaintiff should have the exclusive right and ownership in all such improvements, attachments and designs relating to said Cook grader, whether made by the defendants Cutler or the said plaintiff.

XIII.

In answer to Paragraph XIII these defendants deny that the said defendants Cutler, as Cutler Manufacturing Co., a [22] partnership, set about to or did acquire certain rights and interests which they claim to be adverse to plaintiff under a patent called the Palmer Patent, No. 1251093 of December 25, 1917, and deny that they, the said defendants Cutler, claimed or threatened or asserted that by obtaining said Palmer patent they could modify the plaintiff's machine without plaintiff's consent, or adverse to the rights or powers under the license originally granted to them by the plaintiff, or whereby pursuant to the obtaining of said Palmer patent, or otherwise, they altered or modified or entirely changed the construction or use or operation of the Cook grader as required from plaintiff to a principle entirely different from that conception of the machine as licensed to them under plaintiff's said invention or patent, or builded a machine entirely different or less efficient than plaintiff's, and with reference thereto the said defendants allege that they acquired the Palmer patent not as a means or for the purpose of interfering with the use of the Cook grader, but as a protection to the said Cook grader, and the right to manufacture and sell the same, and that the same was acquired by the defend-

ants Cutler with full knowledge on the part of the plaintiff, and with his consent and approval thereof, and not otherwise, and that said rights under said Palmer patent were used by the defendants only as a protection against claimed infringement against the said Cook grader.

XIV.

These defendants deny that during all or any of the times mentioned in the complaint that the defendants Cutler and Cutler Manufacturing Co., a partnership, changed the design, or plans or machine or its construction or use or operation of plaintiff's machine known as the Cook grader; deny that said Cook grader was desired as an efficient or operative instrument in the sorting of fruit in the packing trade, or continued so until de- [23] fendants Cutler or Cutler Manufacturing Co., a partnership changed the same, and deny that the Cutlers, or the Cutler Manufacturing Co., a partnership, became aware or knew that the machine which they had constructed was in violation of their said license or against the interests of the plaintiff, or that the same then was or became a machine not as efficient or useful or desired by the packing trade as the machine of the plaintiff that they had licensed, and deny that in violation of said license right or against the interests of the said plaintiff said Cutlers or Cutler Manufacturing Co., a partnership, did make or vend a machine so different in design, or construction, or use, or operation from plaintiff's machine as to endanger or damage the plaintiff, or to cause diminu-

tion of royalties or business or returns that could or would have been built up or maintained for plaintiff had the said Cutlers or the Cutler Manufacturing Co., a partnership, continued to make or sell the machine of said plaintiff as they had promised to do, and with reference thereto these said defendants allege that no changes whatever in design or construction or use or operation in the said machine were made without the full consent and approval of such changes on the part of the said plaintiff before any machine containing any such changes was sold.

XV.

Deny that the said defendants have altogether or at all failed to comply with the promise or agreement to furnish the plaintiff with the information provided for in said contract as to the amount of sales and the names and addresses of purchasers and the size and character of the equipment shipped and/or delivered during each calendar month, and deny that the plaintiff has failed to receive such information, but with reference thereto these defendants allege that with the consent and approval of the plaintiff [24] these answering defendants did furnish from time to time statements of the sales, the amount of commissions and royalties due the plaintiff thereunder; that said statements were in form and substance satisfactory to the plaintiff, received by him without objection and without any demand for more particular statements until just prior to the commencement of this suit; that at said time

and on said demand of the plaintiff the said defendants Cutler furnished full information as to all sales, the months during which said sales were made, together with the names and addresses of the purchasers and the size and character of the equipment shipped and/or delivered during each calendar month; that a full, true and correct copy of the statement so furnished the plaintiff prior to the commencement of this suit is hereto attached, marked Exhibit II, and with reference thereto these defendants allege that said statement contains a full, true and correct statement of the entire sales, and is a full, true and correct statement and accounting as to all sales made by these answering defendants under said contract, together with additional commissions earned and paid by the said defendants to the plaintiff on account of sales of other equipment besides the said Cook grader and which were not provided in said contract.

XVI.

With reference to Paragraph XVI of plaintiff's complaint these answering defendants refer to Paragraph Eleventh of the contract between the parties as set out in Exhibit I hereto attached, hereby made a part hereof, for the full ascertainment of the undertaking of these answering defendants in the event of the sale of said business; that the said allegations of the said sixteenth paragraph are substantially correct except that the plaintiff has used the word "determine" instead of "terminate" and if there is

any distinction assert that the provisions of Paragraph [25] Eleventh of the contract should control.

XVII.

Answering Paragraph XVII of plaintiff's complaint these defendants deny that on or about November 29, 1929 the Cutler Manufacturing Co., Inc. was incorporated or took over the business or assets of the said Cutler and Cutler Manufacturing Co., a partnership, but admit that on said November 29, 1929 articles of incorporation of the Cutler Manufacturing Co. Inc. were filed in the office of the Corporation Commissioner of the State of Oregon, but allege that said incorporation was not completed nor the capital stock thereof subscribed until on or about the 14th day of February, 1930, at which time the said incorporation was completed, and on said date all of the property and assets of the said Cutlers and Cutler Manufacturing Co., a partnership, were transferred by proper instruments to the said Cutler Manufacturing Company, Inc. and the said plaintiff was notified thereof.

XVIII.

These defendants deny that sometime in the fall of 1929 or early in 1930, or at all, the defendant Asa B. Cutler and F. W. Cutler, or either of them, or the Cutler Manufacturing Co., a co-partnership, or the Cutler Manufacturing Company, Inc. a corporation, were merged or combined or associated with or became a division of the defendant Food

Machinery Corporation in accordance with negotiations between said parties defendant which had continued over a period of months or years immediately prior thereto, or that any of such enterprises were merged or combined or associated with or became a division of defendant Food Machinery Corporation at all, but admit that F. W. Cutler now is a director of the defendant Food Machinery Corporation, and has been such director at all times since the transfer of said property to the [26] Food Machinery Corporation. These defendants admit that said F. W. Cutler is and has been the attorney in fact and general agent of the defendant Food Machinery Corporation in the State of Oregon at all times subsequent to the transfer of said property to the Food Machinery Corporation, but not prior thereto: these defendants deny that Cutler Manufacturing Company, a corporation, did at any time hold itself out or now holds itself out to be a divisional unit of the Food Machinery Corporation, and with reference thereto these defendants allege: that on or about the 25th day of June, 1930, and not prior thereto, the Cutler Manufacturing Company, Inc., a corporation, did for a valuable consideration to it moving, sell, assign and transfer to the Food Machinery Corporation all of its assets and business of every name and nature, excepting only any rights of the said F. W. Cutler, Asa B. Cutler, Cutler Manufacturing Co., a co-partnership, or Cutler Manufacturing Company Inc. in and under the contract between the plaintiff and the defendants, F. W. Cutler and Asa B. Cutler, dated

May 4, 1928, a copy of which is hereto attached as Exhibit I, and the said Food Machinery Corporation assumed no obligations under said contract; that in and by said transfer the said Cutler Manufacturing Company, Inc. transferred the good will of said business, including the right of the Food Machinery Corporation to use the name Cutler Manufacturing Company in connection with the conduct of its said business, and that any use of the name Cutler Manufacturing Co. as a divisional unit of said Food Machinery Corporation was simply a use thereof to the full enjoyment of the good will of the said Cutler Manufacturing Company, Inc. and was not a separate entity, but simply an indication that the business of the said Cutler Manufacturing Company, Inc. had been acquired by the Food Machinery Corporation; these said defendants further allege that the defendant, Food Machinery Corporation, refused to accept any rights under the said contract between the plaintiff and the defendants Cutler dated May 4, 1928, or to assume any obligations thereunder on [27] the ground and for the reason that said Food Machinery Corporation had theretofore entered into an exclusive contract for the manufacture and sale of the Clear Fruit Grader and was not permitted to manufacture or sell any other machine of that character or for that purpose.

XIX.

Answering Paragraph XIX, these defendants admit that on or prior to the 27th day of February,

1929 the defendant, Food Machinery Corporation, then known as the John Bean Manufacturing Company, obtained exclusive right to make and sell what is known as the Clear Fruit Graders, which are used in the packing business in competition with the plaintiff's said Cook Fruit Grader, and that said exclusive rights to make and use Clear Fruit Graders are now possessed by defendant, Food Machinery Corporation; these defendants deny that the defendants, F. W. Cutler and Asa B. Cutler, are now identified or associated with the said Food Machinery Corporation except that the said F. W. Cutler is a director of the said Food Machinery Corporation, and he and the said Asa B. Cutler are employed by said Food Machinery Corporation; these defendants deny that all of the defendants participate and share in said business and the profits thereof, except that the said defendants, F. W. Cutler and Asa B. Cutler, are employed by Food Machinery Corporation, and the defendant Cutler Manufacturing Co., Inc. is a stockholder in said Food Machinery Corporation.

XX.

These defendants admit that on July 26, 1930 the plaintiff did serve written notice on all of the defendants in and by which plaintiff did attempt to require them and each of them to perform, observe and execute the provisions and agreements made and provided in the license agreement relating to the said Cook grader, but these defendants deny that they or any [28] of them have failed to per-

form or keep said provisions or agreements or comply with said notice; these defendants deny that any failure on their part so to do now or at any time causes or has caused irreparable or any injury or damage to plaintiff in many thousands of dollars, or any sum whatever, or that any accounting, if taken, will show that any sum of money is due from the defendants, or any of them, to the said plaintiff, and with reference thereto these defendants allege that said defendants Cutler and Cutler Manufacturing Co., a co-partnership, has fully carried out each and all of the provisions of said contract and has fully accounted for each and all of the sales made thereunder, and has paid to the plaintiff more than the amount due him under said contract as hereinafter alleged; that these answering defendants had the right to sell said business and the plaintiff had the right under his said agreement, if the purchaser of said business should refuse to take over said contract, to cancel the same and continue to manufacture the Cook grader himself, but the said plaintiff has wholly failed and neglected to exercise his right in that regard.

XXI.

These answering defendants deny that the plaintiff has fully or at all performed or kept all conditions or considerations or requirements stipulated to be performed by him, or has not cancelled or breached the exclusive license agreement made between the parties herein.

XXII.

These defendants deny that the acts and doings of the defendants alleged in said complaint severally or in combination or confederation with each other, or otherwise, have caused or do now cause irreparable or any or continuing injury or damage [29] to the plaintiff in the making or selling of his fruit graders, or in the business arising out of or connected therewith, or at all, or any use or enjoyment of plaintiff's invention or patent rights, or that the acts of the defendants as alleged, or otherwise, have damaged or hurt plaintiff by causing the impairment or loss of the use or sale of his said invention, or the issues or profits rightly or at all to be earned or paid under the terms of the agreement between the defendants Cutler and the plaintiff or the defendants or any of them have failed to observe or keep each or all of said provisions.

XXIII.

Deny that plaintiff has no plain or speedy or adequate or complete remedy at law for the prevention of the frequent or any or recurring injuries and/or redress of the wrongs alleged in plaintiff's complaint, and deny that frequent or numerous or any proceedings against the plaintiff and/or against these or other defendants would occasion a multiplicity of actions or suits without any complete or adequate or any relief.

For a FIRST, further and separate answer and defense to plaintiff's complaint, these defendants allege:

I.

That the defendants, Asa B. Cutler and F. W. Cutler, did enter into an agreement with the plaintiff, the full terms of which are set out in Exhibit I hereto attached, hereby referred to, and made a part hereof.

II.

That heretofore the said defendants, F. W. Cutler and Asa B. Cutler, did on or about the 15th day of February, 1930, sell, assign and transfer unto the Cutler Manufacturing Company, Inc. [30] a corporation organized under the laws of the State of Oregon, all of their business and assets conducted under the name of the Cutler Manufacturing Co., a co-partnership, and did thereafter notify the plaintiff Cook of such sale, assignment and transfer.

III.

That the plaintiff failed and refused to exercise his option to determine said contract and to take over all of the materials on hand for the manufacture of said graders, or to take any action in the premises whatever.

For a SECOND, further and separate answer and defense to plaintiff's complaint, these defendants allege:

I.

That heretofore and on the 4th day of May, 1928, the plaintiff and these defendants, F. W. Cutler and Asa B. Cutler, co-partners as Cutler Manufacturing Co., entered into an agreement, the

full terms of which are set out in Exhibit I hereto attached, hereby referred to and made a part of this answer.

II.

That thereafter the defendants Cutler proceeded to manufacture and sell said grader referred to in said contract, but on account of complaints received by the said defendants Cutler it was determined that said machine was not performing the functions for which the same was designed, and would not without improvement perform the same; that the said defendants did thereupon experiment for the purpose of correcting said defects, with a view of making said machine perform said functions, and did thereafter submit to the plaintiff proposed changes and improvements therein, and did exhibit to said plaintiff a machine with said improvements designed to correct said defects, and said exhibition was made prior to the sale of any of such machine with [31] such changes; that the plaintiff admitted the defects in said machine, approved all of the changes suggested by the said defendants for the correction thereof before any sale of any machine with said changes embodied therein and approved the sale of said machine with said changes; that the said improved machine contained all of the changes made by the defendants in said machine and the said plaintiff authorized and directed the said plaintiff to manufacture said machines with the changes and improvements so made; that thereupon these defendants Cutler thereafter manufactured and sold said machines with the

changes and improvements so submitted to the plaintiff and approved by him and not otherwise.

III.

That no machines were ever sold by these answering defendants, except with the changes and improvements so made by them and approved and assented to by the plaintiff.

IV.

That by reason of the facts herein stated the plaintiff is estopped and should not be heard to say that the defendants Cutler, partners as Cutler Manufacturing Company, or the Cutler Manufacturing Company, Inc. changed said design or machine which it was licensed to sell or manufacture and sold a machine other than that as licensed to them by the said plaintiff, or that the said machine so manufactured and sold by them was not the machine licensed to them, or that the sale of said machine was damaged or the business of plaintiff was by said changes or improvements damaged, or that the same diminished plaintiff's royalties, business or returns that could or would have been built up or maintained for plaintiff. [32]

For a THIRD, further and separate answer and defense to plaintiff's complaint, and by way of counterclaim on the part of Asa B. Cutler and F. W. Cutler against said plaintiff, these defendants allege:

I.

That heretofore the plaintiff and these answering defendants, Asa B. Cutler and F. W. Cutler,

doing business as Cutler Manufacturing Company, a co-partnership, did make, execute and deliver unto each other a contract in words and figures as set out in Exhibit I hereto attached, hereby referred to and made a part of this answer.

II.

That thereafter the said defendants, Cutler, did enter upon the manufacture and sale of the machine licensed to it under said agreement dated May 4, 1928, and did advertise and endeavor to sell the same with the same activity and energy that it advertised and endeavored to sell other articles manufactured by them.

III.

That the said defendants did thereafter from time to time deliver to the plaintiff accounts of sales made by them, and the plaintiff did accept the same and receive payment thereunder without objection; that thereafter and upon demand of the plaintiff the said defendants Cutler did furnish to the plaintiff a full account of all sales by months, together with the names and addresses of purchasers of said machine, together with the size and character of the equipment shipped and or delivered during each calendar month, a full, true and correct copy of such statement is hereto attached, marked Exhibit II, hereby referred to and made a part hereof, and that the said statement contains a full, true and correct statement of all machines manufactured and sold by the plaintiff under said contract, and all of the

information required by the said contract to be furnished to the [33] plaintiff, and contains a full, true and correct statement of all of the commissions and royalties undertaken by the said defendants Cutler to be paid to the plaintiff for all machines manufactured and sold by the said defendants under said contract.

IV.

That in and by said contract the defendants Cutler had the right to sell their business and did on or about the 15th day of February, 1930, sell, assign and transfer all of its business to the Cutler Manufacturing Company, an Oregon corporation; that thereafter the said Cutler Manufacturing Company, Inc., a corporation, did sell, assign and transfer all of its business, except any right, title or interest in or to the contract between the plaintiff and the defendants Cutler dated the 4th day of May, 1928, for a valuable consideration to it moving, to the Food Machinery Corporation, a Delaware corporation; that upon each sale of said business the plaintiff was duly notified of such sale.

V.

That in and by the contract of May 4, 1928 it was provided that the defendant should pay to the plaintiff the sum of $300.00 per month for a period of twelve months, beginning May 31, 1928, and that if the royalties and commissions accruing under said contract should exceed the sum of $3600.00, the company should pay to the plaintiff the difference; that if on May 1, 1929 the royalties and commissions accruing thereunder should be less than

$3600.00 the said sum of $3600.00 should be treated as guaranteed royalties and commissions by the company, to be retained by the said plaintiff, and that the deficit between the amount of said royalties and commissions and $3600.00 should not be thereafter charged by the company against subsequent accruing royalties. [34]

VI.

That in the payments made to the said plaintiff the said defendants Cutler failed to take into account in determining the amount due as royalties and commissions the commissions paid to the said plaintiff on the said Cook grader during the year 1928, and defendants paid to the said plaintiff the sum of $1296.27 over and above the commissions and royalties so earned under said contract.

WHEREFORE, these defendants having answered plaintiff's complaint, pray that plaintiff take nothing by his complaint and that these defendants, Asa B. Cutler and F. W. Cutler have and recover of and from the plaintiff the sum of $1296.27, and that these defendants have and recover of and from plaintiff their costs and disbursements herein incurred.

WILSON & REILLY

Attorneys for Defendants, Asa B. Cutler, F. W. Cutler, co-partners doing business as Cutler Manufacturing Co., and Cutler Manufacturing Company, Inc. a corporation.

F. J. HAMBLY,

Of Counsel for defendants.

United States of America,
District of Oregon.—ss.

Asa B. Cutler, being first duly sworn, on his oath, deposes and says: that he is one of defendants above named, that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

ASA B. CUTLER

Subscribed and sworn to before me this 20th day of February, 1931.

[Seal] ROSE W. SHENKER
Notary Public for Oregon.

My Commission expires Jan. 8, 1932.

[Endorsed]: Filed February 21, 1931. [35]

AND AFTERWARDS, to wit, on the 4th day of March, 1931, there was duly filed in said Court, a Reply to Answer of Asa B. Cutler and F. W. Cutler, in words and figures as follows, to wit: [36]

[Title of Court and Cause.]

REPLY OF PLAINTIFF TO ANSWER OF ASA B. CUTLER, F. W. CUTLER, AND CUTLER MANUFACTURING CO., A PARTNERSHIP.

Comes now the plaintiff Floyd J. Cook, and for reply to so much of the answer as may be material and which contains among its admissions and denials other allegations of fact, to the sufficiency and

materiality of which this plaintiff does now reserve all manner of objection and exception, but does deny each and every matter and thing specifically and generally, alleged among the various admissions and denials of said answer, and more particularly the affirmative matter, as follows:

I.

So much thereof as is contained within lines 10 to 15, page 2, in paragraph II.

II.

So much thereof as is contained within lines 8 to 18, page 3, in paragraph V. [37]

III.

So much thereof as is contained within lines 12 to 18, page 4, in paragraph VI.

IV.

So much thereof as is contained within lines 16 to 20, page 5, in paragraph VIII.

V.

So much thereof as is contained within lines 11 to 21, page 6, in paragraph X.

VI.

So much thereof as is contained within lines 12 to 29, page 7, in paragraph XII.

VII.

So much thereof as is contained within lines 16 to 25, page 8, in paragraph XIII.

VIII.

So much thereof as is contained within lines 18 to 22, page 9, in paragraph XIV.

IX.

So much interest as is contained within lines 30 to 31, page 9, and lines 1 to 22, page 10, in paragraph XV.

X.

So much thereof as is contained within lines 10 to 17, page 11, in paragraph XVII.

XI.

So much thereof as is contained within lines 9 to 29, inclusive, page 12, in paragraph XVIII.

XII.

So much thereof as is contained within lines 8 to 19, page 14, in paragraph XX. [38]

TO THE FIRST, FURTHER, AND SEPARATE ANSWER AND DEFENSE, THIS PLAINTIFF DENIES:

I.

The whole and every part of paragraph III thereof, lines 6 to 9, inclusive, page 16.

II.

This plaintiff specifically denies that any notice as referred to in said affirmative answer was ever given, except on the 5th day of April, 1930, on the letterhead of Cutler Manufacturing Co., as a division of Food Machinery Corporation, 404 East Mill Street, at Grand Ave., Portland, Oregon, as follows, to wit:

"Mr. Floyd J. Cook
Corbett Bldg.
Portland, Oregon
Dear Sir:

We desire to give notice that the Cutler Manufacturing Company, Inc. has taken over the business and assets of the Cutler Manufacturing Company, co-partnership.

Yours truly,
CUTLER MANUFACTURING CO. INC.
By A B Cutler
ABC PK President"

And save and except that certain letter from James G. Wilson, dated June 30, 1930, to wit:

"Dear Sir:

"Referring to your letter of April 29th, and subsequent telephone conversation with you in regard to offer made by you on behalf of Mr. Cook in connection with the contract between Mr. Cook and Mr. Asa B. Cutler and F. W. Cutler of May 4, 1928, as I advised you at the time the offer would not be acceptable but stated I would submit the same, I am now authorized to say that the Cutlers will not consider the offer you made. This of course is without prejudice to the rights of the Cutlers or the Cutler Manufacturing Co. Inc.

"I am further authorized to advise you that the Cutler Manufacturing Co. Inc. has transferred its business to the Food Machinery Corporation. Mr. Cook was notified of the trans-

fer [39] of the business from the Cutler Manufacturing Co., a co-partnership, to the Cutler Manufacturing Co. Inc., but to date has exercised no option accorded him under the contract.

"Mr. Asa B. Cutler and F. W. Cutler consider they have no further interest in the contract except to finish up the material on hand as provided for in said contract, and they will send Mr. Cook statement of royalties due him with check to cover within a few days.

"I am writing this as attorney for Mr. Asa B. Cutler and F. W. Cutler and the Cutler Manufacturing Co. Inc. I am sending a copy of this letter to Mr. Floyd J. Cook, Corbett Building, Portland, Ore.

Very truly yours,

JGW:S (Signed) James G. Wilson"

TO THE SECOND, FURTHER, AND SEPARATE ANSWER AND DEFENSE, THIS PLAINTIFF FOR REPLY, DENIES:

I.

Each and every matter and thing set out and alleged within lines 20 to 31, page 16, and lines 1 to 12, page 17, in paragraph II thereof.

II.

All the matters and things set out and alleged in paragraph III thereof.

III

All the matters and things set out and alleged in paragraph IV thereof.

IV.

And for further reply to the matters set forth, and by way of exception to the insufficiency thereof, the plaintiff Cook says: That no estoppel could arise on the facts set forth or stated for, as appears from the whole of said answer, and from the affirmative parts thereof, and to that particular portion to which this reply is now directed, to wit, the second, having reference to exhibit 1 attached thereto, all the defendants [40] sustained and held, and do still sustain and hold to the plaintiff a fiduciary relationship and special agency concerning which no estoppel can arise in law or equity against this plaintiff.

TO THE THIRD, FURTHER, AND SEPARATE ANSWER THIS PLAINTIFF FOR REPLY, DENIES:

I.

All the matters and things set forth within lines 13 to 17, page 18 in paragraph II thereof and each and every thing therein contained save and except that it is admitted that the defendants made the agreement dated May 4, 1928.

II.

All the matters and things set forth and alleged within lines 19 to 32, page 18, and lines 1 to 5, page 19, in paragraph III, and the whole thereof.

III.

Each and every matter and thing within lines 6 to 18, page 19, in paragraph IV thereof.

IV.

That while it is true that some of the matters and things set forth in paragraph V, lines 20 to 31, page 19, are in apparent accord with Exhibit 1 referred to in said affirmative answer, this plaintiff denies that the matters and things alleged in paragraph V are sufficient or constitute any defense for that, the statement attached to the answer, Exhibit 2, on its face shows by the acts and doings of the defendants themselves a different interpretation than they now put upon it, to wit: The payment and application of the very sums, in accordance with the allegations of the complaint first filed herein and not in accordance with said answer [41] and the defendants should or ought to be bound by their own acts and interpretation in pursuance of their relationship with plaintiff, whatever it was.

V.

Each and every matter and thing set forth and alleged within lines 1 to 8, page 20, in paragraph VI thereof, and denies specifically that there was ever paid at any time or at all commissions or royalties over and above those earned under the actual transactions conducted by defendants with plaintiff as alleged in the complaint.

VI.

Further replying to said answer in that behalf, plaintiff Cook says that Exhibit 2 and the actual transactions which took place and are not recorded

thereon, will of and by itself and from proof offered be shown to be incorrect.

WHEREFORE, plaintiff prays judgment as formerly prayed in his complaint; and that defendants take nothing by their said answer.

W. C. BRISTOL
WM. L. GOSSLIN
Attorneys for Plaintiff.

United States of America,
District and State of Oregon,
County of Multnomah—ss.

Floyd J. Cook, being first duly sworn, on oath says: That he is the plaintiff named in the foregoing reply; that he has read the answer of Asa B. Cutler, F. W. Cutler, and Cutler Manufacturing Co., a partnership, and makes this reply thereto, and that he verily believes the same to be true.

FLOYD J. COOK

Subscribed and sworn to before me this 4th day of March, 1931.

[Notarial Seal] WM. L. GOSSLIN
Notary Public for Oregon. My commission expires Nov. 14, 1934.

[Endorsed]: Filed March 4, 1931. [42]

AND AFTERWARDS, to wit, on the 31st day of March, 1933, there was duly filed in said Court, a Report of the Master in Chancery, in words and figures as follows, to wit: [43]

[Title of Court and Cause.]

MASTER'S REPORT.

To the Honorable, the Judges of the above entitled Court, sitting in Equity:

The undersigned, Master in Chancery appointed to take evidence on the issues in the above entitled suit and make report to the court of his findings, conclusions and recommendations, begs leave to report as follows: [44]

This suit arises out of a contract executed May 4th, 1928, between Floyd J. Cook, hereinafter referred to as the patentee, and Asa B. Cutler and F. W. Cutler, then co-partners doing business as the Cutler Manufacturing Company, hereinafter referred to as the licensees, covering a fruit grading machine known as the Cook Grader.

The elements of the contract which are relevant to this controversy are as follows:

I. (Contract, paragraph 1.) The patentee granted to the licensees the exclusive right to manufacture and sell the Cook Grader, with all modifications, alterations, improvements, including attachments thereto, and means of delivering or receiving fruits, sold in connection with the Cook Grader, for a term commencing May 1st, 1928, and ending September 30th, 1933.

II. (Contract, paragraph 1.) The licensees agreed, during the term of the license, not to manufacture any fruit grading machine of the same nature or used for the same purposes, except such as were then being manufactured by them.

III. (Contract, paragraph 2). The patentee agreed to diligently prosecute a reissue of the patent and granted to the licensees the exclusive right of manufacture and sale under such reissue.

IV. (Contract, paragraph 3). The licensees agreed to manufacture the Cook Grader, to make all necessary blue prints, patterns, jigs, and designs for such manufacture, which then became the property of the licensee. [45]

V. (Contract, paragraph 3). The licensees agreed that all Cook Graders should be manufactured from good materials and with good workmanship in keeping with approved methods of mechanical practice and manufacture.

VI. (Contract, paragraph 4). The licensees were bound to place the Cook Grader on the market and promote its sale and advertise it with the same diligence with which it promoted the sale of any other machines or products manufactured by them.

VII. (Contract, paragraph 5). All orders for graders obtained by the patentee at the date of the contract were assigned to the licensee, who assumed all obligations of the patentee and agreed to fill them promptly.

VIII. (Contract, paragraph 5). The licensees bought from the patentee all materials on hand.

IX. (Contract, paragraph 6). The licensees agreed to pay the following royalties:

a. 10% of the amount of the sale price of all equipment sold by the licensees, but not less than $50.00 for each fruit grader with a sizing portion of thirty feet or longer, and a minimum royalty for smaller machines in proportion to the length of the sizing portion thereof.

b. All royalties to be due and payable on May 1st, 1929, except that the sum of $300.00 thereof should be paid at the end of each calendar month for a period of twelve months. [46]

c. If on May 1st, 1929, royalties and commissions accruing, exceeded $3600.00 (the amount of the monthly advances) the licensees were at that time to pay the difference. If they were less than $3600.00, that sum should be considered as guaranteed royalties and commissions and the deficit not charged to the patentee.

d. Beginning May 1st, 1929, accruing royalties became payable at the end of each calendar month for all shipments and all deliveries made by the licensees during said month and within fifteen days prior to the end of the month.

e. The licensees obligated themselves to deliver to the patentee on or before the 15th day of each month a written statement showing the amounts of sales, made during the preceding calendar month, with the names and addresses of the customers, and

all equipment shipped and/or delivered during each month.

X. (Contract, paragraph 6). In addition to the foregoing, the licensees agreed to pay the patentee

a. A commission of 15% of the amount of all sales of Cook Graders and attachments in the Medford district during the year 1928.

b. A further sum of 15% on all sales of equipment to Henry E. Kleinsorge of Sacramento and the Earl Cook Company of California during the year 1928; provided, that the commission should not be paid on more than four Cook Graders sold to said purchasers. [47]

XI. (Contract, paragraph 7). In the event that the Commissions for the year 1928 and the royalties accruing to October 1, 1931, did not equal or exceed $15,000.00, the licensees agreed to pay such sum as might be necessary to bring up the total to $15,-000.00, PROVIDED that the licensees retained the option to withhold payment and cancel the contract by giving the patentee notice in writing to that effect.

XII. (Contract, paragraph 7). If the licensees did not pay the deficit last mentioned the patentee had the right at his option to cancel by giving ten days notice.

XIII. (Contract, paragraph 7). In the event of cancelation under XI and XII hereof, the licensees had no further right to manufacture or sell the Cook Grader, or any reissue thereof, or any im-

provements, alterations or modifications of the machine.

XIV. (Contract, paragraph 8). Breach by either party of the terms and conditions of the contract gave the other the right to cancel upon giving notice of the specified breach; provided, however, that the offending party should have thirty days after such notice within which to make good the breach.

a. Cancellation did not relieve the guilty party from liabilities then existing thereunder.

XV. (Contract, paragraph 10). On expiration or earlier termination of the agreement, the patentee obtained exclusive ownership of all improvements, attachments and designs relating to the Grader, or its attachments developed after the [48] date of the contract, irrespective of the party by whom made.

b. Patentable improvements made during the term of the agreement would be made by and at the expense of the patentee.

c. At the expiration or earlier termination of the contract, patentee had the option for thirty days to take over from the licensees all patterns, blue prints, jigs and designs relating to the manufacture of the devises, or the improvements or alterations thereon, at cost.

d. At the expiration or earlier termination of the contract, the patentee had the option for thirty days to take over from the licensees all machines and materials on hand at cost.

e. If the patentee did not exercise this option the licensees were given the right to complete machines in process of manufacture and sell such machines, and any others then on hand, not exceeding, however, ten machines in number, upon which the licensees agreed to pay the same royalties.

XVI. (Contract, paragraph 11). If during the term of the contract the licensees sold their business, the patentee had the option,

a. Either to require the purchaser to assume and discharge all of the licensee's obligations under the contract;

b. To cancel and terminate the agreement, put an end to the licensee's right thereunder, and prevent any [49] such rights passing to the purchaser.

So much for the contract.

The theory of plaintiff's bill, omitting the allegations as to his invention of the device, obtaining patent and like matters, is as follows: (The appropriate numbered paragraphs of the bill are set out in parenthesis in the following analysis).

A. (IV) That his device and the business he had developed in marketing it competed successfully and profitably with those manufactured by the defendant company.

B. (V) That to eliminate competition, the defendants Cutler solicited the license afterwards granted by the contract.

1. (VI) By representing that they controlled the fruit grading manufacturer and producting through their organization, and could and would

procure large scale production and sales of plaintiff's grader, and

2. That if plaintiff did not grant them a license they would place on the market a similar machine which would interfere with plaintiff's trade and nullify his patent rights.

C. (VII) Influenced thereby, plaintiff entered into the licensing contract.

D. (IX) That from the beginning the defendants Cutler intended to undermine and destroy plaintiff's machine and business and suppress his products, in order that they might [50] more easily market a machine belonging to them and their associates.

E. (XII) That upon obtaining the license the defendant Cutler changed the design of the Cook Grader, thereby impairing its efficiency and rendering the trade and demand therefor valueless to themselves and to plaintiff, thus limiting the amount of royalties and earnings which would accrue to the patentee.

F. (XIII) That after acquiring the license from the patentee, the defendants Cutler acquired the Palmer patent and thereupon built a machine differing from and less efficient than the Cook Grader.

G. (XV) That the defendants Cutler failed to furnish plaintiff with the monthly statements of sales required by the contract; that plaintiff has demanded but has not received them and therefore

does not know what machines have been sold and what royalties are due.

H. (XVI) That in November, 1929, the defendant Cutler incorporated the Cutler Manufacturing Company, Inc., which took over the business and assets of the Cutler partnership and the defendant Cutler became its executive officer.

I. (XVIII) That in the fall of 1929, or early in 1930, the Cutlers as copartners and the Cutler Manufacturing Co. Inc., merged with the defendant Food Machinery Company and F. W. [51] Cutler became and now is a director thereof and its statutory attorney in fact in the State of Oregon, and that the Cutler Manufacturing Company (sic) has since held itself out to be a division of the Food Machinery Corporation.

J (XIX) That on or about February, 1929, the defendant Food Machinery Corporation (then known as the John Dean Manufacturing Company) obtained the exclusive right to manufacture and sell a fruit grader known as the "Clear Fruit Grader", which was a machine competing with the Cook Grader. That the Cutlers participate in and share in such business and the profits thereof.

K (XX) That on July 26, 1930, the patentee served notice on all of the defendants requiring them to perform and observe the licensee contract which he had entered into with the Cutlers; that the defendants have refused so to do and thereby plaintiff has suffered and will suffer irreparable injury and damage.

L (XXII) That the acts of the defendants severally and in combination have caused and do cause irreparable damage to plaintiff, particularly by causing an impairment in the sale of his invention and in the royalties which otherwise would otherwise accrue therefrom. [52]

M. Relief. Plaintiff prays.

1. For an accounting of the royalties which have or should have accrued as the result of the sales;

2. A discovery from the defendants Cutler as to what fruit grading machines of the same kind and purpose as the Cook Grader were being manufactured by them prior to the execution of the contract;

3. That he be allowed damages alleged to have been suffered by reason of the acts of the defendants;

4. That the defendant company, individually and as partners, be enjoined from manufacturing any fruit grading machine competing with plaintiff's, except those which it was manufacturing prior to May 4, 1928;

5. That the Cutler Manufacturing Company, Inc., be held to be the assignee of the defendants Cutler, a co-partnership, and in that event it be enjoined in the same respects as the co-partnership;

6. That if the corporation be found not to be personally bound by the plaintiff's contract with the Cutlers, a co-partnership, it be enjoined from manufacturing any fruit grading machinery similar in nature and purpose to the Cook Grader.

7. That the Food Machinery Corporation be held to be the assignee of the exclusive rights of the Cut-

lers in the contract with plaintiff, and in that event it be enjoined from manufacturing any fruit grading machinery of the same nature [53] and purpose as the Cook Grader, except those which the Cutlers were manufacturing prior to May 4th, 1928.

8. That if the Food Machinery Company is to be personally bound by the terms of the original license agreement, it be enjoined from manufacturing any fruit grading machinery of the same nature and purpose as the Cook Grader, except as to such machines as were being manufactured by the Cutlers prior to May 4th, 1928.

9. That the patentee be declared entitled to all improvements, attachments and designs relating to the Cook Grader developed subsequent to May 4, 1928, whether made by the Cutlers or by plaintiff.

10. That plaintiff be decreed his costs and disbursements and have any further equitable relief as may be found proper.

The Master is clearly of the opinion and so finds that the allegations of the plaintiff herein mentioned under the head of B 1 and B 2 are not true as a matter of fact and if true are immaterial to the issues herein; that the allegations under the head of D are not sustained by the evidence and are in fact untrue; that any changes which were made by the defendant Cutler in the construction and design of the Cook Grader were made in good faith to overcome certain defects and difficulties that experience had disclosed and that in fact the improved Cook Grader [54] was not an inferior device, but ren-

dered equally as good results and avoided the defects in the original Cook Grader heretofore referred to; that while the defendants Cutler acquired the patent rights in the Palmer patent, they did so in good faith in order to avoid any possible suit for infringement and that it is not true that the machine known as the "Improved Cook Grader" was less efficient than "The Original Cook Grader."

The Master finds that the contract between plaintiff and the defendants Cutler was entered into in good faith between all the parties thereto, that it was not induced by fraud, misrepresentation, undue influence or other improper means; that the parties entered into its performance in good faith and at least until the latter part of 1929, or early in 1930, the defendants Cutler did nothing which could be questioned by Cook, and acted with entire openness and good faith toward him, and were not guilty of any breach of the contract. While it is true that the monthly statements were not rendered as in the contract provided, this occurred because of the seasonal nature of the business, the rush and congestion which existed at that time, and the delays in rendering the statements caused thereby, which were acquiesced in by Cook.

Cook's device disclosed invention of a high order and was peculiarly adapted to grading tender-skinned fruits, such as pears. Sizing of fruits is an essential process in packing; various machines were in the market, such as the Weight machine, but could not be successfully used in handling pears because

of the [55] fact that a slight pressure on the skin of the fruits injured the same, blemishing its appearance and finally causing decay. His device consisted of a moving belt to which was fastened an apron of duck or canvas upon which the fruits rode until it reached an aperture through which it fell into a receiving bin. An essential part of the device was the means by which these apertures could be increased or decreased in size. Cook accomplished this by a series of guide boards, which were inserted under the belt and against the apron, thus forming a continuous slot of varying size so that the smaller fruit dropped into the upper bin near the receiving end of the grader and the larger were carried by the belt until they reached the sized aperture which permitted them to fall into the bin. By means of set screws a delicate adjustment of the size of the apertures could be had.

Shortly after Cook built his first device a radical change took place in the packing business. The packers were required to remove the film of spray on the fruit by washing. Acid was used in the tank as well as the necessary re-agent. Although attempts were made to dry the fruit after being washed some moisture always remained on their surfaces. The canvas belt tended to become wet from the moisture of the fruit and stretch, and the acid caused the belt to rot. Difficulty was also experienced with belts working off the pulleys; the guide boards, which were wooden, and which were used to increase or diminish the size of the aperture and which were pushed out against the apron of the

belt, would at times splinter and tear [56] the apron. None of these defects were fatal and were of the kind that generally assert themselves in the development of any new device. The improved Cook sought to overcome these defects and in a large measure did so. A rubberized belt carried on a sprocket chain was used instead of the belt with the canvas apron; steel troughs were used instead of the wooden guide boards. Plaintiff contends that the rubberized belt was not as flexible and therefore inferior to the canvas apron, and that his type of guide board permitted a more delicate adjustment than the steel troughs later used. This is denied and the Master is of the opinion that the improved Cook overcame most of the defects of the original Cook and that in actual practice it rendered quite as satisfactory results.

The Sale of the Cutler Business.

The copartnership of Cutler Manufacturing Company was not the only manufacturer of fruit grading machinery on the Pacific Coast. The John Bean Manufacturing Company and several other concerns were in active competition with it. The John Bean Manufacturing Company had acquired the patent rights to the "Clear" fruit grader. At various times overtures had been made by the John Bean Manufacturing Company, (whose name was afterwards changed to Food Machinery Corporation) to the Cutlers to merge with that corporation, which had already absorbed various other competitors. The Cutlers for a long period of time declined to these offers. [57]

Late in 1929, however, they commenced to give heed to the proposal made by the Food Machinery Corporation and it was finally agreed that they would turn their business over to the Food Machinery Company and take stock for the purchase price. With this in view the Oregon corporation, Cutler Manufacturing Co., Inc., was organized; to it the defendants Cutler, doing business as the copartnership, transferred all of the assets of that copartnership. There is nothing to indicate that they did not intend to and did not attempt to transfer the Cook contract to the new corporation and the Master is of the opinion that they did so. Whether or not under the terms of the license they had power so to do without Cook's consent is another matter which the Master will discuss later.

The undisputed testimony, however, is that the Food Machinery Company declined to take over the contract on the Cook patent, at any rate unless Cook would consent that the purchaser be free from the obligations therein to manufacture and sell Cook Graders exclusively. Several reasons exist for this attitude, first the Food Machinery Company already had a license to manufacture and sell Clear Graders, a competing machine, and second, there was a serious question in their minds as to whether the Clear Grader was superior to either the Original Cook or the Improved Cook. They were, however, willing to take over the contract if the exclusive feature was eliminated and were willing, if Cook insisted, that the Cutler Manufactur-

ing division of their corporation, when the merger should be accomplished, [58] should handle only Cook Graders. The Plaintiff, however, refused to consent to any such modification. The Food Machinery Company therefore refused to take over the Cook contract. This, the Master believes, was entirely within its rights.

If, however, the defendants Cutler, or the Cutler Manufacturing Co. Inc., breached the contract with Cook, the question still arises whether or not he may follow the assets of the copartnership and the Cutler Manufacturing Co. Inc., into the hands of the Food Machinery Company. First, however, it becomes necessary to determine whether or not any such breach existed.

The Master has reached the conclusion that the facts which induced Cook to enter into a contract were as follows:

The copartnership, Cutler Manufacturing Company, had built a vigorous and successful business in the fruit handling machinery and was in a position to obtain by means of its sales organization a wider and more profitable market for the Cook Grader than Cook, with his limited means of financing and manufacture, was able to accomplish. However, he desired to protect himself against the license being assigned by reason of any incorporation of the copartnership, or the sale of its business to some other concern, which might not give the device the same attention which the Cutlers were able and were willing to give. For this reason the 11th and concluding paragraph was inserted in the contract.

The respondents contend that on a sale of the business, Cook was limited [59] to the remedies there specified. The Master, however, does not believe that this is an exclusive remedy or right. The Cutlers were bound for a term to manufacture and sell this product and to use all reasonable diligence and good faith in so doing.

If they sold their business to a purchaser who was satisfactory to Cook and was willing to assume the obligations of the contract, Cook would consent to the assignment; if the purchaser was unsatisfactory to him, or was unwilling to assume the obligations, he had the option to cancel and terminate the agreement and thereby terminate the rights and obligations of both the Cutlers under the license and prevent any attempted assignment from being effected. The Master is of the opinion, however, that Cook had no right or power to compel the purchaser of the balance of the Cutlers' business to assume the obligations of the contract, or compel it to take an assignment thereof from the Cutlers.

Cook attempted to do this, but the Master has reached the conclusion that such demand was ineffective. However, it is perfectly clear that he never released or intended to release the Cutlers from the obligations of the contract. And the remedy of cancelation provided for in paragraph 11 is purely cumulative and was exercisable at Cook's option and he could not be compelled by any act of the Cutlers to exercise that option. The Master, therefore, concludes that so far as the Cutlers are concerned the contract remained in force

and they have at all times been [60] bound to use diligence in the manufacture and sale of the Cook Grader and of the Improved Cook Grader.

It is the contention of the Respondents that paragraph 11 of the contract just adverted to, renders the contract unilateral and therefore if they sold their business, unless Cook was able to persuade the purchaser to take an assignment and assume the obligations of the contract, they were released. The Master finds himself unable to accept this proposition. Under the contract, Cook could not, by any act of his, nullify the effect of the license granted. The Cutlers obtained an exclusive license for the full period of the term. Cook's right to terminate was conditioned upon a contingency which could only arise by the voluntary and affirmative act of the licensees. If they sold their business, a new situation arose; they were not compelled to sell and they were not induced to sell by any act of the plaintiff. In the event they sold their business, the situation of Cook might then become very different and he might find himself faced with a situation unfavorable to his interest. One of the inducements to the contract was the fact that the Cutlers had built up a large trade in the fruit machinery field, they had an active sales organization and by giving the license to them Cook might reasonably expect that the Cutlers by the use of the good will they had acquired and of the sales organization which already existed, would materially enhance future sales of his products. A destruction of the business or the sales organization, or placing the

business in the hands of an unknown purchaser, might be detrimental to Cook's [61] interests. On the other hand, he might feel that such a sale and the assumption by the new purchaser of the burden of the contract would be advantageous. To safeguard himself, this clause was inserted in the contract and in the judgment of the Master it conferred upon the plaintiff the right to consider and determine whether he would hold the Cutlers or whether he would cancel the contract. The obvious reason for retaining the right to cancel, in the event that the purchaser was unsatisfactory or unwilling to assume the obligations of the contract, is that Cook might determine that the sale of the remainder of their business by the Cutlers would render it difficult for them to manufacture and sell the product as efficiently and in as great a volume as when they had other lines of fruit machinery business under their management. The plaintiff had the right to the benefits which in his opinion accrued to him by reason of the personal responsibility, character and ability of the Cutlers. As said by Lord Denman, "You have a right to the benefits you contemplated from the character, credit and substance of the party with whom you contract".

Humble vs. Hunter, 12 Adol. & E (Q.B.) 310

Wooster vs. Crane, 72 N. J. Eq. 23, 27

Arkansas Smelting Co. vs. Belden Co., 127 U. S. 379

The contract, as all the parties admit, involves the question of personal confidence in the capabil-

ities and integrity of the Cutlers. Unless, therefore, it contained a clause clearly giving the right of assignment, the Cutlers could not assign without the consent of Cook. In giving them the license, he relied [62] upon their ability and the good will which they had achieved in the business. A stranger might not have those abilities or be able to take the good will.

> Corvallis Etc. R. R. Co. vs. Portland etc. Ry. Co., 84 Ore. 524, 538.

The Cutlers could not, therefore, substitute any purchaser without Cook's consent under the license agreement.

> W. H. Barber Agency Co. vs. Co-Operative Barrel Co., 133 Minn. 207.
>
> Wooster vs. Crane, 73 N. J. Eq. 22.

The Master's conclusions in this regard are: first, that the Cutlers could not compel Cook to consent to an assignment of transfer of the contract to any purchaser; second, that Cook never consented to any transfer or assignment to the Food Machinery Company unless that company would assume the obligations of the contract in toto. This the Food Machinery Company declined to do. When Cook refused to accept the Food Machinery Company's proposition to handle the Cook Grader along with the Clear Grader, or to have its Cutler Manufacturing Company division manufacture and sell the Cook, he was within his legal rights and did not breach the contract. But did this compel him then to exercise the option to cancel and terminate the

rights and obligations of the Cutlers under the license agreement.

As has been said, I am of the opinion that the provisions of paragraph 11 of the contract were merely cumulative to the rights which Cook would have had if that clause had been omitted. [63] Certainly without such a clause the fact that the Cutlers might have sold their business would not release them from the contract. Cook could insist that, notwithstanding any such sale, they proceed to the manufacture and sale of his grader, and that, on default, they respond for whatever damages he may have suffered by reason of such failure. An analysis of the contract convinces me that the clause 11 was inserted solely for his benefit and such seems to be the weight of authority.

In Kant-Skore vs. Sinclair, 30 Fed. (2d), 884 certiorari denied; 74 L. Ed. 1150, the Circuit Court of Appeals for the Sixth Circuit held as follows:

> "Clearly the provisions were inserted for the benefit of the licensor and not the licensee; they were designed to give him additional rights in case of its breach. He had the option to give or not give notice that the 'agreement shall be cancelled' at the expiration of sixty days; the licensee then had the right to avert the impending cancellation by repairing the breach. If it failed to do so within the specified period, what would be the result? The contract says 'then this agreement shall cease and determine'. Is the termination thereby

made automatic or is it again at licensor's option? Licensee is the wrongdoer; It has failed to avail itself of the opportunity to repair the breach. Unless the language compels the construction of automatic cancellation, thus giving the wrongdoer possible direct benefits, the clause will be held to confer a right only upon the other party, the licensor. In our judgment its true meaning is that the licensor may end the agreement, and the license but that despite the notice, he need not avail himself of this additional right; he may treat the contract as continuing in full force and effect."

As said in Western Union Telegraph vs. Brown, 253 U. S. 112,—

"The condition plainly is for the benefit [64] of the vendor, and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void' means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice.

"The fact that the contract contains a privilege of ending it at the election of the vendor for non-payment of the sum stipulated does not convert it into an option terminable by the purchasers at their will. Stewart v. Griffith, supra."

If the respondents' position is correct then, if a purchaser to whom they sold their business declined to assume the obligations of the Cook contract, Cook's only remedy would be to cancel. Then he would indeed have placed himself at the mercy of his licensee. Clause 11 was placed in the contract at Cook's instance. It is unlikely that he would have demanded a clause which would have put him at the mercy of his licensees and thus enable them at any time to avoid all liability by merely selling their business to a purchaser who would refuse to assume the obligations of the contract.

I construe clause 11 to mean that if the Cutlers sold their business Cook had the following options:

a. To consent to the assignment to the purchaser on condition that the latter assumed all the obligations of the contract, and if the purchaser declined so to do Cook could,— [65]

b. Insist that the Cutlers continue to perform; or

c. He could cancel and terminate the agreement.

Respondents insist with ability and ingenuity that clause 11 renders the contract unilateral because in the event of the sale of their business by Cutlers Cook could, at his option, cancel the agreement. It is, of course, axiomatic that unless both parties are bound by a contract, it cannot be enforced against either of them. Learned counsel cites the case of,—

> City of Pocatello vs. F. & D. Co. of Md., 267 Fed. 181.

This involved a contract between the city and a contractor to construct certain public improvements. It contained the provision, however, that if for any

reason the city failed to make sale of and receive the money on certain water works bonds then, at the option of the city, it could terminate the contract without being liable to the contractor. There was no obligation on the part of the city to sell the bonds, they might never have offered them for sale, there was no allegation that, before the demand for performance on the contractor, the city had sold the bonds and received the money. The contract in fact disclosed no obligation of any kind on the part of the city. So far as the city is concerned, the contract was purely executory and the conditions upon which it was bottomed might never come to pass. [66]

Such a situation differs vitally from the present case. By the contract here Cook gave an exclusive license effective in praesenti, except as to minor details, such as reissue of the patent and the defense of infringements. The license became effective at the moment plaintiff signed the contract. By no act of his could he shorten the term of the license. He had no general right to cancel at his pleasure and his option to cancel arose only under two circumstances, either upon breach by the licensee or by the sale of their business, the continued existence of which was one of the reasons inducing him to grant the license.

I will not unduly lengthen this report by a review of the cases cited by learned counsel. I have read them all but in none of them in my opinion was the option to terminate given to one party because of a change of condition resulting from the voluntary act

of the other. If for a valuable consideration I give a five year easement over my property to A, provided that if he sells the property to another, I may at my option revoke the easement, it cannot be said that such a contract lacks mutuality. As long as A keeps the property I cannot deprive him of the easement. If he sees fit to sell, it is his act, not mine, which may bring about the revocation. Being of the opinion that the sale of their business by the Cutlers to the Cutler [67] Manufacturing Company did not terminate the contract, the next question presented is whether or not by the sale the Cutlers were thereafter released and the corporation substituted in their place, or whether both the partnership and the corporation are bound by its terms.

I find that the contract was assigned by the partnership to the corporation and that the corporation assumed the burdens as well as the benefits thereof. I base this upon the testimony of F. M. Cutler and upon the minutes of the corporation. Defendants' Exhibit 8 recites that the president and secretary of the new corporation are "authorized and directed to execute in the name of the company and deliver to the Food Machinery Corporation all deeds, bills of sale or other instruments necessary to fully carry out the transfer of all of the real and personal property and the business of this corporation in accordance with the terms of the contract of purchase, excepting only from the transfer of the assets of this (Cutler Manufacturing Company, Inc.) Company, the interest of this company in the contract made, executed and delivered by and between Asa

B. Cutler and F. W. Cutler, partners doing business as Cutler Manufacturing Co., Portland, Oregon, and Floyd J. Cook, dated the 4th day of May, 1928, said omission of the interest of this corporation in said contract being by direction of the Food Machinery Corporation." On April 5th, 1930, Cutler Manufacturing Company, Inc., wrote the plaintiff giving notice that the Cutler Manufacturing Company, Inc. [68] had taken over the business and assets of the Cutler Manufacturing Co., a copartnership. (Plaintiff's Exhibit 12).

On this subject Mr. F. W. Cutler testified as follows:

> The MASTER: What was the purpose of writing to Mr. Cook this letter?
>
> A. Simply to advise him of our plans and what we were doing.
>
> The MASTER: Well, I know, but what right did you think that he had to know about this? You must have had some definite purpose in writing that letter.
>
> A. It was my idea that Mr. Cook would have the right to cancel his contract if we sold out.
>
> The MASTER: And if you didn't cancel it, then what?
>
> Mr. REILLY: You better let the lawyers argue the law on this.
>
> The MASTER: Well, I want to know what is in his mind.
>
> A. You will recall in my testimony this morning I said I discussed that matter with

Mr. Cook as to our incorporating, and he stated we merely incorporated to get out of the deal. We had incorporated in this case here——

The MASTER: Well, was the company——

A. ——but we didn't intend to get out of the deal.

The MASTER: In other words, the real purpose of this letter was to tell Mr. Cook——

A. He would have a right, if he wanted, to cancel it; it was up to him.

The MASTER: Yes, but if he didn't cancel it the Cutler Manufacturing Company——

A. I believe would have to carry it along. There was a matter of some doubt in our minds as to what would be the legal—we are not lawyers.

There is no direct evidence that Cook gave his assent to this assignment and no evidence that he consented to the substitution of the corporation for the individual liability of the Cutlers as copartners. However, both prior to the institution [69] of this suit and by the terms of his complaint he has at all times insisted that the corporation as well as the copartnership was bound to perform the contract and he seeks relief as to both. Ratification or confirmation has the same legal effect as an express prior assent. Cook's action in serving the notice of demand on both the Cutlers as copartners and upon the corporation, in my judgment constitutes such a confirmation and ratification of the act of assignment by the copartners.

This license contract demands on the part of the licensees, or their assignees, the rendition of services both in the manufacture and marketing of a product. It requires the licensee to use the same diligence in the sale of the Cook's Grader as they exercised in the marketing of their own device. It involves, therefore, the performance of duties which are not assignable in the true sense of the word, inasmuch as they involve a relationship of personal trust and confidence in the ability of the promissor, but they are delegable. When the copartnership assigned the contract to the corporation by the sale of its entire business and assets of the latter, the legal effect thereof was to delegate to the new corporation the performance of the copartnership's duties under the contract, and the assignment of the copartnership's rights thereto, namely to manufacture and sell the Cook Grader. (1 Williston on Contracts, par. 418, page 779).

The transaction did not constitute a novation releasing the Cutlers as copartners. Although Cook could have done so, there is no evidence from which any such complete novation can be inferred. [70]

> "One of the essential elements to a novation is that there should have been an extinguishment of the old debt and another is that there should have been a mutual agreement between all the parties that the old debt should become the obligation of the new debtor. 21 A. & E. Ency. of Law (2nd Ed.) 662; Kelso vs. Fleming, 104 Ind. 181 (3 N. E. 830). When the court found as it did in its fifth finding to the effect that the de-

fendants sold and transferred their hotel business to the corporation in payment for their stock; that as a part of the consideration therefor the corporation assumed and agreed to pay the obligations incurred by defendants in their hotel business, including plaintiff's claims; and that on May 6th, 1903, the corporation by virtue of its promise became liable for and agreed to pay plaintiff's demands—it expressly bases the consideration of the new promise upon the value of the goods and hotel business purchased, and thereby the court has impliedly excluded from being a part of that consideration the extinguishment of the defendants' obligation and the release of the defendants. It nowhere appears, expressly or by necessary inference, that the parties to the contract of sale intended that the defendants should be released from their obligation to plaintiff; but the only legal inference deducible therefrom is that the corporation was to be and become the principal debtor, and the defendants were to be and become the principal debtor, and the defendants were to be and become sureties in respect to the plaintiff's demands. * * * It nowhere appears as a fact found by the court that plaintiff ever agreed to or did release defendants, or that it was a part of the agreement of sale between defendants and the purchasing corporation that defendants were to be released by plaintiff. * * * There having been no agreement by plaintiff to release defendants, and no release by plaintiff there

could not have been a novation in law as found by the court."

Miles vs. Bowers, 49 Ore. 429, 432, 433, 435.

[71]

"It is well established that to constitute a novation by the substitution of the debtor, the contract so to do must be the result of the concurrence and consent of all parties interested, namely, the original debtor, the new debtor, and the creditor. The mere agreement of Bullis to assume the indebtedness of the logging company, would not, of itself, constitute a novation. There would still remain the essential requisite that the canning company consented to such decision and looked solely to him for payment. It would be possible to add Bullis as an additional debtor and still hold the canning company liable. Under such circumstances there would be no novation. One of the essential elements, therefore, is that there must be a release of all claim or liability against the original debtor; Miles vs. Bowers, 49 Ore. 429 (90 Pac. 505); 20 R. C. L. 369 and numerous authorities cited in exhaustive notes, L. R. A. 1918 B, 113."

Vawter v. Rogue River Valley Canning Co., 124 Ore. 94, 99.

I therefore state my conclusion of law,—that by the assignment of the Cutler Manufacturing Co., Inc., the copartners remained bound and Cook had the right to demand performance both by the mem-

bers of the copartnership and by the new corporation as well.

However, as heretofore stated, I find as a fact that the Food Machinery Company never became the assignee of the contract from the corporation, nor did it assume any of the obligations therefor and that no relief can be granted against it, except that in my judgment the court should retain jurisdiction over the Food Machinery Company so that in event the Cutlers or the Cutler Manufacturing Co. Inc., do not satisfy the decree against them the assets of the Cutler Manufacturing Company may be pursued into the hands of the Food Machinery [72] Company. This recommendation is based upon the fact that the Food Machinery Company has received all of the assets of the Cutler Manufacturing Company, Inc., and issued its stock in payment thereof. It did this with full knowledge of the existence of the Cook contract and that it had been acquired by the Cutler Manufacturing Company, Inc., and it must be presumed that it knew the obligations and burdens of that contract.

The findings and conclusions thus reached make necessary first,—the assessment against both F. W. and Asa B. Cutler, the original licensees, and the Cutler Manufacturing Co., Inc., of the damages, if any, suffered by Cook through their failure and refusal to perform the contract; and secondly, an accounting as to royalties and commissions.

It is clear from the record that from and after the sale of their business to the Cutler Manufacturing Co., Inc., neitehr they nor the corporation made

any pretense of performing the contract. It is true that several graders were assembled or sold subsequent to that time, but this was done under their belief that the sale terminated this license contract and that plaintiff, not having elected to take over the jigs, patterns, etc., under clause 10 of the contract, the right remained in them to sell not more than ten graders assembled or to be assembled from parts on hand.

The testimony clearly establishes that since January 1st, 1929, the demand for Cook graders has decreased very materially. [73] This is in part due to the fact that in some districts the market was to a large degree saturated, and second, that business conditions, particularly in the fruit raising districts, became such that prospective buyers were financially unable to purchase. How many graders could have been sold by the exercise of due diligence is difficult, if not impossible, of ascertainment. This difficulty, however, is not Cook's fault. He had granted an exclusive license to the defendants Cutler, he retained no right to manufacture or sell. The defendants Cutler and the Cutler Manufacturing Co., Inc., made no attempt to develop the market or sell the machine, believing that they were no longer under any obligation so to do. It would, however, be most unjust and inequitable to permit the licensee to escape liability for the breach of his contract because of the difficulty of proving ensuing damages occasioned by the breach.

An examination of the volume of sales made during the period when the Cutlers were actively per-

forming the contract and the evidence furnished them as to the number of fruit graders of the various kinds sold after their breach, leads me to believe that these damages may be approximated with reasonable certainty. Defendants' exhibit 10 is a graph, showing first, the amount in dollars and cents of the sales of all graders; second, in the upper diagram, commencing with the year 1928, the amount of sales of graders, except Cook's, down to and including the end of the year 1931, and third, the amount of Cutler's sale of Cook Graders commencing with the first of 1928 down to and including the end of the year 1930. The lower graph of the exhibit shows the number [74] of the different graders sold, the upper line indicating the total amount of graders of all kinds sold from 1925 to the end of 1931, and the lower line showing the number of Cook Graders sold by the Cutler Manufacturing Company.

The total sales of fruit graders of every kind sold in the year 1928 amounted to $47,445.30. Of this amount the Cutler Manufacturing Company sold $19,558.15 worth, or approximately 41% of the entire volume of sales.

In 1929 the total sales of fruit graders was $36,-808.48 of which $22,393.48 were Cook Graders, or about 61%.

In 1930 twenty-six fruit graders of all kinds were sold. Six of these were Cook Graders, but it is to be remembered that in 1930 the Cutlers were only attempting to sell enough Cook Graders to clean

up their stock of parts on hand. The gross sales of all graders amounted to $18,416.63.

In 1931 no Cook Graders were sold, but the gross sale of other competing graders amounted to $21,660.00. It is fair to assume that had the licensees and their assigns, the Cutler Manufacturing Co., Inc., used the same diligence in 1931 that they had in previous years the sales of the Cook Grader would have amounted to at least 40% of the total sales of graders.

As to the number of graders sold, the Master has computed the following percentage from Exhibit 10:

Year	All Makes	Cook Graders	Percentage of Cook Graders to Total Sales
1928	107	28	26%
1929	42	22	52%
1930	26	6	18.7%*
1931	20	—	— [75]

*In 1930 the only effort of the licensees was to sell the graders the parts of which were on hand. Therefore this percentage is relatively unimportant.

I find that it is a fair inference that in 1930, had the defendants F. W. Cutler, Asa B. Cutler and the Cutler Manufacturing Co., Inc., exercised reasonable diligence they could have sold 17 machines. In that regard I infer that in that year they could have sold at least 40% of the sales. Their competitors sold 26 machines. That represented 60% of the market and the total amount of machines that

could have been sold would be 43, and 40% thereof would be 17. The Cutlers, however, sold only 6. Therefore as to that year Cook's damage, using the minimum royalty of $50.00 per machine, would be $850.00. In 1931, using the same method of computation, they could have sold 13 machines, or a royalty loss of $650.00.

I am not unmindful of the provisions of the 7th paragraph of the contract which declares that in the event the commissions for the year 1928 and the royalties accruing under the contract to October 1st, 1931, do not exceed the sum of $15,000, that then the company on October 1st, 1931, shall pay to Cook such sum as shall be necessary to bring the total up to $15,000, provided that the company shall have the option to withhold payment of such deficit and cancel the contract by giving Cook notice in writing to that effect. The evidence clearly establishes, however, that Cook had actual knowledge in [76] 1930 that both the Cutlers as individuals and the Cutler Manufacturing Company, Inc. had disaffirmed the contract; that they looked upon it as terminated; that they did not intend to and refused to further perform it in any respect then or at any time in the future. For this reason I believe that, under the 7th clause of the contract, the period for which Cook can recover damages terminated on October 1st, 1931.

There is, however, an additional element of damage which I believe should be considered. By reason of the failure of the licensees to perform, the Cook Grader has been taken from the market. Common

experience, fortified by the provisions of the contract itself, indicates that the advertisements, developments and sales efforts of the licensees of the machine were essential to the successful performance of the contract. It is a matter of importance in marketing any device that the sales efforts and advertisements be continuous in order that the goodwill of the business may be maintained and the purchasing public informed of the existence of the device, its merits and where it can be purchased. When sales efforts cease, the resultant damage is far greater than the loss of any individual sale, because it involves the destruction of the entire market, not only for the particular period but for the future, and requires the expenditure of much money and time to rebuild the demand for the device. I believe and find such resulting damage is substantial and real and that the innocent party should be made whole as far as may be possible. [77] I am not unaware that the assessment of damages of such character closely borders on speculation, but I am of the opinion that an allowance may properly be made for it. I therefore find and allow the additional sum of $5,000 as such damages.

In arriving at an accounting of the royalties and commissions to which plaintiff may have been entitled, consideration must be given to the following phases:

1st. Cook was to receive a 10% royalty on the amount of the sales price of all equipment sold;

(a) A minimum royalty of $50.00 was prescribed

for each grader with a sizing portion of thirty feet or longer.

(b) A proportionate minimum for smaller machines.

2nd. A further commission of 15% on the amount of all sales of Cook Graders and attachments in the Medford district during the year 1928.

3rd. A further commission of 15% on all sales of equipment to Kleinsorde at Sacramento, California, and the Earl Fruit Company, not exceeding four Cook Graders.

4th. If the royalties and commissions earned up to May 1st, 1929, were less than $3600.00, Cook was to receive that amount notwithstanding.

5th. If the total royalties accruing to October 1st, 1931, did not exceed $15,000, the licensees were bound to pay the difference, but had the option of withholding such payment and cancelling the contract by giving written notice to that effect. [78] In the event of failure to pay the $15,000 the licensee had the right at his option to cancel the contract.

6th. In addition to the foregoing, an oral agreement was entered into whereby Cook was to receive commissions on sales made in the Medford district during the year 1928 on all equipment manufactured or sold by the copartnership. As to the terms of this agreement the parties are not in accord. The Cutlers claim that Cook was entitled to receive a commission on those sales only, orders for which he had obtained personally, or which were the direct result of his efforts. Cook, on the other hand, con-

tends that he was made general sales representative of the Cutlers of the district in question, that he was to receive the commission on all sales made in that district during the year, and that he personally solicited all of the concerns who had occasion to use the kind of equipment handled by the Cutlers, requesting them to make all their purchases from the co-partnership, and assuring them that it would be of direct benefit to him because he would receive a commission irrespective of whether or not he personally obtained the orders. The testimony on this subject is not entirely satisfactory. It is apparent that the Cutlers in fact allowed Cook a commission on all orders as to which they believed he was the inciting cause. Their testimony, however, is not clear and certain as to the exact details of the agreement, while that of Cook in that regard is definite.

While I am not entirely satisfied on the subject, I am constrained to find that the oral contract was as claimed [79] by Cook. This finding, however, is only important on the question of whether, as the Cutlers claim, Cook was overpaid and they are therefore entitled to a credit for this overpayment.

In the accounting Plaintiff makes claim for royalties on all parts and replacements used on Cook Graders, such as additional belting, canvas curtains, and the like. As a matter of law, the Master has reached the conclusion that he is not entitled to royalties on such items. The 6th paragraph of the contract provides for a royalty of 10% on the amount of the sale price of all equipment sold by the

company. This language might be stretched to include the sale of repair and replacement parts, although it would in my judgment be a strained construction of the language used, inasmuch as the purchaser of a patented device has the right to go into the open market and purchase any necessary parts to repair or replace the machine without payment of any royalty, unless the parts themselves are patented. This patent is a combination patent and it is not claimed that the patentee invented the parts. His invention consists of combining in a new arrangement, thereby obtaining new results, well known mechanical parts and principles, and even if the Cutlers had not received a license from Cook they could have sold such repair and replacement parts without infringement. However, the clause in question is modified by the succeeding clause, which reads as follows: [80]

> "it being understood that under no circumstances shall the royalty payable to the second party hereunder be less than $50 for each fruit grader with a sizing portion of thirty feet or longer, with a minimum royalty for smaller machines in the ratio of the sales price of such smaller machine to the sales price of such machines with a sizing portion of thirty feet or longer."

I construe this royalty clause as being limited to the sales of complete machines, which include as part of the equipment the connecting link, a moving belt which delivers the fruit to the grader. I have

therefore disallowed plaintiff's claim to royalties upon the sale of repair and replacement parts.

Plaintiff further claims royalties upon various attachments not covered by the patent which are often sold and used in connection with the grader, such as off-grade return belts, sorting tables and the like. They are not parts of the Cook Grader. They are used in packing houses which do not use Cook Graders, and I can see no more reason for allowing royalties as to them than for the washing machine which may be and generally is placed at the head of a Cook Grader and from which the washed fruit is delivered to the connecting link and thence to the grader itself. I have therefore disallowed all claims upon such devices as not being within the license contract.

Upon the accounting I find that defendants' Exhibit 3 states an accurate account between the parties, except in the following particulars:

1. It omits certain items of commissions provided in the contract amounting to $109.69. [81]

2. It omits numerous items of commissions earned outside of the contract, amounting to $291.53.

3. There is an item of $3.22 charged against Cook under date of February 25, 1929, which in my judgment is not proper.

4. Cook is entitled to a 10% royalty on the amount of $75.00 charged as engineering expense on the sale of the grader to the Oxnard Citrus Association. I do not believe that this is a proper deduction from the invoice price so far as Cook is concerned.

Detailed statements of the first and second items above mentioned are hereto attached, marked Exhibits A and B.

The Master states the following as the true account between the parties:

May 1st, 1928 to May 1st, 1929.

Royalties and commissions earned under contract, Defendants' Exhibit 3	$4564.23	
Additional items allowed by Master	102.19	$4666.42
Commissions earned outside of contract, Defendants' Exhibit 3	$1245.04	
Additional items allowed by Master	291.53	$1536.57
		$6202.99
Payments to Cook shown by Defendants' Exhibit 3	$6754.98	
Disallowed by Master	3.22	$6751.76
Overpayment to Cook		$ 548.77

[82]

May 1st, 1929 to December 31st, 1929.

Defendants' Exhibit 3	$1598.85	
Additional amount allowed invoice 30-080	7.50	
1930 Exhibit 3	809.16	
Earned on Oxnard sale	7.50	$2423.01
Total payments		$2749.43
Overpayment to Cook		$ 326.42
Overpayment to May 1st, 1929		$ 548.77
Total overpayment to Cook		$ 875.19

The defendants Cutler and the Cutler Manufacturing Company are entitled to a credit in the amount so found as an offset against the damages allowed by the Master.

The Master recommends the following decree be entered in this case:

First. That no relief be given the plaintiff against the Food Machinery Company;

Second. That plaintiff have judgment against the defendants F. M. Cutler and Asa B. Cutler as co-partners, and the Cutler Manufacturing Co., Inc., in the amount of $6400 as to which they have a claim for overpayments of $875.19, leaving a net amount of $5520.81, and that he have and recover his costs against these defendants. [83]

The Master was engaged for a period of fourteen days in taking testimony in this case, and two days

in hearing argument of counsel. He has been engaged ten days in the consideration of the testimony, the briefs of counsel and in the preparation of his report. He has incurred $25.00 traveling expenses. He prays that his disbursements may be allowed and that the court fix his compensation in the premises and order the payment of them as so allowed. He transmits with his report three volumes of testimony, consisting of 1106 pages, and the exhibits filed by the respective parties as noted in the transcript. He further transmits to the court the briefs submitted by counsel.

Respectfully submitted,

ROBERT F. MAGUIRE,

Master in Chancery. [84]

EXHIBIT A.

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
9464	Kleinsorge	$93.75	$29.94
9502	Pinnacle Pkg Co.	28.50	28.50
9583	Kleinsorge	114.60	29.25
10024	Apple Growers Ass'n	145.00	14.50
30080		315.00	7.50
			$109.69

[85]

EXHIBIT B.

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
9497	Hearty	19.80	19.80
9547	Van Hovenburg	22.80	22.80
9606	Sgobel & Day	.09	.09
9623	Steinhardt & Kelly	.71	.71
9630A	E. W. J. Hearty	.58	.58
9634	"	4.50	4.50
9646	"	1.08	1.08
9674	Suncrest Orchards	.60	.60
9675	Steinhardt Kelley	1.20	1.20
9676	Sgobel & Day	.60	.60
9677	Newbey & Son	.48	.48
9691	E. W. J. Hearty	.18	.18
9694	Sgobel & Day	.52	.52
9732	Amer. Fruit Growers	9.00	9.00
9745	Medford Ice & Cold Stor	14.50	14.50
9767	E. W. J. Hearty	22.69	22.69
9776	Medford Ice & Cld Stor	20.29	20.29
9815	Ind. Pkg Co	.28	.28
9822	Am. Fruit Growers	.10	.10
9834	Palmer Corp	.11	.11
9856	Rogue River Co.	1.35	1.35
9875	" " Valley C. Co.	27.36	27.36
9989	E. W. J. Hearty	22.69	22.69
9904	Steinhardt & Kelly	3.04	3.04
9905	Newbey & Sons	3.04	3.04
9906	Sgobel & Day	3.04	3.04
9907	Pinnacle Pkg Co	3.04	3.04
9908	E. W. J. Hearty	2.04	2.04

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
9909	Sgobel & Day	.52	.52
9910	Steinhardt & Kelly	.54	.54
9925	Del Rio Orchards	2.39	2.39
9926	Sgobel & Day	.36	.36
9927	" "	.86	.86
9937	E. W. J. Hearty	6.75	6.75
9952	Newbry & Son	.78	.78
9953	Steinhardt & Kelly	1.14	1.14
9972	Rogue River Co	1.43	1.43
9986	E. W. J. Hearty	.58	.58
10000	Sgobel & Day	3.04	3.04
10024	Sgobel & Day	.34	.34
10062	C. A. Knight	.70	.70
10063	Pinnacle Pkg Co	3.06	3.06
10065	Del Rio Orchard	1.26	1.26
10086	E. W. J. Hearty	10.80	10.80
10087	Del Rio Orchards	.18	.18
10088	C. & E. Fruit Co.	9.85	9.85
			[86]
Forward		$228.25	$228.25
10095	Am. Fruit Growers	4.35	4.35
10137	Sunset Orchards	3.07	3.07
10140	C. & E. Fruit Co.	3.04	3.04
10151	C. & E. Fruit Co.	.56	.56
10162	Rogue River Co.	.41	.41
10176	C. & E. Fruit Co.	3.46	3.46
10180	C. & E. Fruit Co.	3.04	3.04
10187	Growers Exchange	1.75	1.75
10188	Growers Exchange	.76	.76

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
10189	C. A. Knight	3.04	3.04
10190	Sgobel & Day	3.04	3.04
10218	E. W. Hearty	1.80	1.80
10266	Independent Pkg. Co.	3.04	3.04
10342	E. W. J. Hearty	2.23	2.23
10343	Steinhardt & Kelly	2.87	2.87
10344	C. & E. Pkg. Co.	2.67	2.67
10345	C. A. Knight	.29	.29
10346	Suncrest Orchard	1.81	1.81
10347	Independent Pkg. Co.	1.62	1.62
10348	Sgobel & Day	1.93	1.93
10476	Am. Fruit Growers	.42	.42
10477	C. & E. Fruit Co.	.52	.52
10478	Sgobel & Day	.94	.94
10527	E. W. J. Hearty	1.12	1.12
10599	C. & E. Fruit Co.	3.08	3.08
10627	Steinhardt Kelly	.56	.56
10628	Pinnacle Pkg. Co.	1.43	1.43
10717A	Sgobel & Day	1.47	1.47
10718	C. & E. Fruit Co.	3.04	3.04
10719	Pinnacle Pkg. Co.	.73	.73
10730	E. W. J. Hearty	3.15	3.15
		$291.53	$291.53

[Endorsed]: Filed March 31, 1933 [87]

AND AFTERWARDS, to wit, on the 14th day of June, 1933, there was duly filed in said court, Exceptions of Plaintiff to Master's Report, in words and figures as follows, to wit: [89]

[Title of Court and Cause.]

PLAINTIFF'S EXCEPTIONS TO MASTER'S REPORT

Comes now the plaintiff, within the time allowed by the orders of the court, and presents and files these his exceptions to the report of Hon. Robert F. Maguire, Master in Chancery, heretofore filed with the clerk of this court. In these exceptions plaintiff accepts as true all findings of fact made by the Master, and these exceptions are based solely upon assertions, first, that the Master's conclusions do not follow from the facts specifically determined, and, second, that the Master has erred as a matter of law in the interpretation of a certain written contract.

Plaintiff respectfully submits that the report is in error in the following particulars: [90]

EXCEPTION I

1. The report is in error in that the Master has applied an incorrect interpretation of the contract of May 4, 1928, (see Exhibit I, attached to answer of F. W. Cutler and Asa B. Cutler) and in particular of paragraph Seventh of said contract.

2. The Master has construed the acts of the defendants F. W. Cutler and Asa B. Cutler in sell-

ing their business to Food Machinery Company, in 1930, as the equivalent of cancellation of said contract of May 4, 1928, under the provisions of paragraph Seventh thereof (Report, pp. 33, 34). Plaintiff asserts that the acts of said defendants in disposing of their business and ceasing to perform their obligations under the contract of May 4, 1928, did not constitute a cancellation within the meaning of said paragraph Seventh. As a consequence defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., on account of their breaches of the contract of May 4, 1928, are liable to plaintiff in an amount, based upon facts found by the Master, shown in the following table:

(a) Difference between the sum of $15,000.00 and $9,501.19 royalties actually paid up to October 1, 1931, ($6,751.76 plus $2,749.43; Report, pp. 39, 40) payable on October 1, 1931, under terms of said paragraph Seventh,	$ 5,489.81
(b) General damages resulting from destruction of market for plaintiff's machine caused by failure of defendants to perform their obligation under the contract to produce and market plaintiff's machine, being the same element and in the same amount as determined by the Master (Report, pp. 34, 35),	5,000.00

[91]

(c) Estimated royalties on additional machines which would have been sold between October 1, 1931, and September 30, 1933, had defendants performed their obligations under the contract of May 4, 1928, (Estimated on basis used by Master, Report, p. 33. 30 machines during the 2-year period, or 15 machines per year, at $100. average royalty per machine—See Exception II),	$ 3,000.00
Total	$13,498.81

3. The result of a correct interpretation of the contract, applying the facts as found by the Master, is that plaintiff is entitled to recover $13,498.81 instead of $5,520.81, recommended by the Master.

In the event that Exception I is disapproved, plaintiff makes the following

EXCEPTION II

1. The report is in error in that the amount recommended by the Master for damages consisting of estimated royalties on machines which would have been sold by defendants in 1930 and 1931, had defendants performed their obligations under said contract of May 4, 1928, (see item (a), paragraph 2, Exception III) is arrived at by the use of the $50.00 minimum royalty specified in said contract of May 4, 1928. To be statistically correct the

amount of this item should be determined by use of average royalties paid by defendants on machines sold by defendants in 1929 and 1930. Said average is in excess of the minimum royalty and is not less than $100.00 per machine.

2. The result of the use of the average royalty in [92] place of the minimum royalty, based on the facts found by the Master, is shown in the following table:

(a) Estimated royalties on additional machines which would have been sold by defendants in 1930 and 1931, had defendants performed their obligations under the contract of May 4, 1928 (See Report, p. 33)		
17 machines in 1930 at $100.00,	$1,700.00	
13 machines in 1931 at $100.00,	1,300.00	$3,000.00
(b) Other damages found by Master (Report, pp. 34, 35),		5,000.00
Total		$8,000.00
(c) Credit overpayments to plaintiff found by Master (Report, p. 40),		875.19
Net Total		$7,124.81

3. To correct only for the erroneous use by the Master of the $50.00 minimum royalty in place of

the correct average royalty of not less than $100.00, the amount of $5,520.81 found by the Master should be increased to $7,124.81.

In the event that the foregoing Exceptions I and II are overruled, plaintiff makes the following

EXCEPTION III

1. The report is in error in that the sum of $5,520.81 recommended by the Master as the amount of the judgment to which plaintiff is entitled (Report, p. 40), is insufficient to the extent of $104.00, as the result of two arithmetical errors made by the Master.

2. The said arithmetical errors occur in the following [93] manner:

The sum of $5,520.81 is derived by the Master in the manner shown in the following table:

(a) Estimated royalties on additional machines which would have been sold by defendants in 1930 and 1931, had defendants performed their obligations under the contract of May 4, 1928,	$1,400.00
(b) Other damages (Report, pp. 33, 34),	5,000.00
Total	$6,400.00
(c) Credit overpayments to plaintiff (Report, p. 40),	875.19
Net Total	$5,524.81

The first arithmetical error is that the Master computes the net total as $5,520.81 instead of $5,-524.81, an error of $4.00.

The second arithmetical error is that the Master uses for item (a) in the foregoing tabulation $1,-400.00, whereas the components of said item (a) of $850.00 and $650.00 (Report, p. 33) total $1,500.-00, an error of $100.00.

3. To correct only the arithmetical errors the total of $5,520.81 stated by the Master should be increased by $104.00 to $5,624.81.

WHEREFORE, plaintiff prays that these exceptions may be heard by the court and that the report of the Master be corrected in the respects designated in the foregoing exceptions, and that plaintiff shall have judgment against defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., in the sum of $13,498.81, together with his [94] costs against said defendants; and further that if said defendants fail to satisfy said judgment, the assets formerly owned by said defendants and transferred to defendant Food Machinery Company may be pursued into the hands of said Food Machinery Company.

OMAR C. SPENCER
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH

[Endorsed]: Filed June 14, 1933. [95]

AND AFTERWARDS, to wit, on the 15th day of June, 1933, there was duly filed in said Court, Exceptions of Defendants Asa B. Cutler and Frank W. Cutler to Master's Report, in words and figures as follows, to wit: [96]

[Title of Court and Cause.]

EXCEPTIONS TO MASTER'S REPORT.

Come now defendants, Asa B. Cutler and Frank W. Cutler, and Cutler Manufacturing Company, Inc., a corporation, and except to the report of Robert F. Maguire, Esq., the Standing Master, filed in this cause on the 31st day of March, 1933, and for cause of exception show:

I.

That the Master has at pages 22 and 23 of his report erroneously and incorrectly interpreted the contract of May 4, 1928 between plaintiff and defendants, F. W. Cutler and Asa B. Cutler, copy of which is attached to the answer of Asa B. Cutler and F. W. Cutler, and Cutler Manufacturing Company, Inc., a corporation, and has based his recommendation [97] for a recovery against these excepting defendants upon said erroneous interpretation of said contract. The particular error in interpretation asserted by these defendants is that the Master interpreted section 11 of said contract as giving to the plaintiff his choice of three options:

1. In the event of a sale of the business of Asa B. Cutler and F. W. Cutler, a partnership, to make an agreement with the purchaser by which

the purchaser assumed all of the obligations of said contract.

2. Notwithstanding such a sale, to require these excepting defendants to continue full performance of said contract, and

3. To cancel the contract in its entirety whereas these excepting defendants assert that said contract gave to plaintiff in the event of the sale of the business of Asa B. Cutler and Frank W. Cutler, a choice of two options only:

1. To agree, if he could, with the purchaser that the purchaser would assume all of the obligations of the contract, or

2. To cancel and determine the contract in its entirety except as to the part already performed.

In presenting this exception these excepting defendants will refer to the contract of May 4, 1928, and to the testimony of F. W. Cutler, pages 898-900 of the transcript of testimony transmitted to the Court by the Master.

II.

That the Master has at pages 23-29 of his report rejected the contention of these defendants that the provisions of Section 11, if construed as giving to plaintiff alone an [98] option to cancel in the event of a sale of the business of Asa B. Cutler and F. W. Cutler, were void for lack of mutuality.

III.

The Master found at page 29 of his report that upon the sale of the business of Asa B. Cutler and

F. W. Cutler to Cutler Manufacturing Company, Inc. the partners remained bound and plaintiff had a right to demand performance both by the partnership and by Cutler Manufacturing Company, Inc., whereas there was no testimony of any exercise by plaintiff of any option to which he was entitled under said contract of May 4, 1928.

IV.

In computing the damages against these excepting defendants the Master at pages 32-33 of his report assumed that, if these excepting defendants had continued full performance of said contract of May 4, 1928 during the years 1930 and 1931, they could have sold Cook graders to the extent of forty per cent of the total fruit graders sold by the whole manufacturing trade during those years, and that the total number of machines sold represented only sixty per cent of the market so that these excepting defendants could and would have sold not only forty per cent of all fruit graders actually sold by the whole trade but also forty per cent of a theoretically larger market presumably to be created by the efforts of these excepting defendants. These excepting defendants assert that there was no evidence that the total market would have been any greater, or the total number of machines sold by the whole trade any greater during 1930 and [99] 1931 if these excepting defendants had continued in full performance of said contract of May 4, 1928.

V.

The Master has found in his report at pages 34 and 35, in computing damages against these excepting defendants, that the sum of $5,000.00 should be included for loss of good will or prestige of the Cook Grader due to the cessation of advertisements and sales efforts by these excepting defendants. These excepting defendants assert that there was no evidence received from which any value could be placed upon this alleged good will, or as to the amount of money and time necessary to rebuild it, if it was in danger of loss, or was lost, and the allowance of said amount is based not on the record but upon speculation and conjecture. Moreover, the Master found at pages 33-34 of his report that the evidence clearly establishes that plaintiff had actual knowledge in 1930 that both the Cutlers, as individuals, and the Cutler Manufacturing Company, Inc., had disaffirmed the contract, and therefore had ample opportunity to protect the good will of his Cook Grader by advertisements and sales efforts of his own. The date of such disaffirmance was in January, 1930, as disclosed by the testimony of the plaintiff Cook at pages 563 and 565 of the transcript of testimony.

VI.

The Master, in stating the account between the plaintiff and these excepting defendants, found at pages 36 and 37 that there was an oral contract outside and independent of the contract of May 4, 1928, that the plaintiff Cook should act as a gen-

eral sales representative of defendants, Asa B. Cutler and F. W. Cutler in the Medford district, and at page 39 found [100] that the accounting submitted by Asa B. Cutler and F. W. Cutler on the hearing omitted numerous items of commissions earned by the plaintiff Cook outside of the contract involved in this suit, amounting to $291.53, and he allowed plaintiff Cook credit in the account for that sum. At page 36 of his report he found that in stating the account between the plaintiff Cook and defendants Asa B. Cutler and F. W. Cutler under the contract of May 4, 1928, involved in this suit, the Cutlers had also allowed Cook "a commission on all orders as to which they believed he was the inciting cause." These excepting defendants assert that whether or not Cook had an outside oral contract with Asa B. Cutler and F. W. Cutler, and whether Cook was fully paid under said outside contract, is immaterial in this suit, not being pleaded or relied on in the complaint, that the Master was powerless to make any finding as to whether the Cutlers had paid to Cook the full amount due under said outside contract, and that in stating the account between the parties under the contract of May 4, 1928, involved in this suit, the Master's inquiry as to the outside contract should have been limited to an inquiry as to what the Cutlers actually had allowed Cook under said outside contract, the balance of the payments to him being applicable to the contract of May 4, 1928, and not what the Cutlers should have allowed Cook.

VII.

The Master recommended at page 40 of his report that plaintiff recover his costs against defendants, F. W. Cutler and Asa B. Cutler, as co-partners, and Cutler Manufacturing Company, Inc., whereas approximately two-thirds of all of the hearing before the Master consisted of the unsuccessful attempt of the plaintiff to prove the allegations of the complaint that [101] there was a conspiracy on the part of all of the defendants to eliminate competition, that the defendants Cutler intended to undermine and destroy plaintiff's machine and business and suppress his products and to impair the efficiency of the machine so as to make it unsuitable for fruit grading, that the Cutlers coerced plaintiff into making the contract of May 4, 1928 by threats to interfere with plaintiff's trade, and nullify his patent rights, that the Cutlers, under the pretense of making improvements in the Cook Grader, made changes in it which did in fact decrease its efficiency and value in the trade, all of which issues were found against plaintiff by the Master and found to be wholly unsupported. With the elimination of the charges so unjustifiably and unnecessarily made the case would have been a simple one, requiring approximately one-third of the time which the Master was actually compelled to devote to the case, and this fact renders it inequitable to assess all the costs against these excepting defendants.

WILSON & REILLY,
Solicitors for Defendants.

[Endorsed]: Filed June 15, 1933. [102]

AND AFTERWARDS, to wit, on the 15th day of June, 1933, there was duly filed in said Court, Exceptions of Defendant, Food Machinery Corporation to Master's Report, in words and figures as follows, to wit: [103]

[Title of Court and Cause.]

EXCEPTIONS OF FOOD MACHINERY CORPORATION TO MASTER'S REPORT.

Comes now defendant Food Machinery Corporation, and excepts to the report of Robert F. Maguire, Esq., the Standing Master, filed in this cause on the 31st day of March, 1933, and for cause of exceptions show:

I.

The Master failed to find that Food Machinery Corporation recover its costs from plaintiff.

WILSON & REILLY,
Solicitors for Defendant,
Food Machinery Corporation.

[Endorsed]: Filed June 15, 1933. [104]

AND AFTERWARDS, to wit, on the 4th day of December, 1933, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit: [105]

[Title of Court and Cause.]

MEMORANDUM

McNARY, District Judge:

It clearly appears from paragraph seven of the contract that the parties contemplated that the royalties accruing thereunder should at least equal the sum of $15,000 to October 1, 1931, provided the first party did not exercise its option and cancel the contract by giving notice as therein provided.

No notice of cancellation of the contract was given, and the plaintiff is entitled to a judgment in the sum of $15,000, less the payments of royalties made prior to October 1, 1931.

The damages caused by the destruction of the market for Cook graders and the estimated royalties on additional machines which would have been sold after October 1, 1933, until the expiration of the contract had defendants performed their obligation, will be treated as general damages.

The finding of the Master that the general damages should be assessed at $5,000 is supported by material and adequate evidence.

A decree will be entered according to this memorandum, and costs and disbursements will be awarded the plaintiff. The defendants' exceptions to the report of the Master will be overruled. Plaintiff's exception one to the Master's report will be

sustained insofar as consistent with this memorandum, and otherwise overruled.

[Endorsed]: Filed December 4, 1933. [106]

AND AFTERWARDS, to wit, on the 20th day of December, 1933, there was duly filed in said Court, Objections by Defendants Asa B. Cutler and F. W. Cutler to Proposed Findings, in words and figures as follows, to wit: [107]

[Title of Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Come now the defendants, Asa B. Cutler and F. W. Cutler, co-partners doing business under the name of Cutler Manufacturing Company, and Cutler Manufacturing Company, Inc., an Oregon corporation, and object to plaintiff's proposed Findings of Fact and Conclusions of Law served in response to the Court's memorandum of December 4, 1933, in the following particulars:

I.

These defendants hereby save and reserve all rights accruing under their exceptions heretofore urged to the Master's Findings and to the overruling of said exceptions by this Court.

II.

These defendants object to that part of proposed finding of fact X, beginning with the words "prior

to the institution of this suit" in line 25 to and including the words "contract of May 4, 1928, in Line 28 [108] of page 11 of said Findings, on the ground and for the reason that the the same is not supported by the evidence in that the undisputed evidence shows that at the time of the making of the contract the plaintiff insisted that by a mere incorporation of the partnership and transfer of the business of the co-partners Cutler to such corporation there would be no obligation on the part of the co-partners to further manufacture the Cook Grader, and that Paragraph XI was inserted to permit under such circumstances the plaintiff to retake and manufacture the Cook Grader.

III.

These defendants object to that part of the proposed Finding of Fact XIV finding that the oral contract referred to in said finding provided that the defendants Cutler would pay a 15% commission on all machinery and equipment sold by the partnership in the Medford district during the remainder of the year 1928 for the reason that the same constitutes a finding of liability on a contract not in issue in this case and the plaintiff is not entitled to recover in this case any sum over and above what the books of the defendants allow the plaintiff on items outside the written contract of May 4, 1928, and further that the oral contract herein referred to was one to pay plaintiff a commission only on those orders which he himself secured.

IV.

These defendants object to proposed Finding of Fact XV in that it does not follow the opinion of the Court on the exceptions to the Master's report and fails to allow these defendants credit for the sum of $1,536.57 paid to the plaintiff and particularly disallows $291.53 paid by the defendants to the plaintiff on account of the written contract of May 4, 1928. [109]

V.

These defendants object to proposed Finding XVI on the ground that the same does not follow the opinion of the Court on the exceptions to the Master's Report and fails to allow these defendants full credit for the sum of $1,536.57 paid the plaintiff and particularly disallows as payment on account of the written contract of May 4, 1928 the sum of $291.53.

VI.

These defendants object to proposed Finding XVII on the ground that it is contrary to the evidence and that written notice of the intention of these defendants not to proceed with the further manufacture of Cook Graders was given to plaintiff by plaintiff's Exhibits 11 and 12 and by the sworn answer of these defendants filed herein, all prior to October 1, 1931, and on the ground that the commencement of this suit was an election to treat the contract as breached and to collect full damages for the period plantiff claimed the absolute right to keep said contract in force, and on the

further ground that there was no obligation on the part of the defendants to pay the sum of $15,000.00 on October 1, 1931, and the said defendants had the right to fail to pay said sum and it created no obligation on the part of the defendants to pay to the plaintiff any sum other than royalties on machines actually sold.

VII.

These defendants object to proposed Finding XVIII and the whole thereof on the ground that it is not sustained by the evidence and is contrary to the evidence and on the further ground that written notice of the intention of these defendants not to proceed with the further manufacture of Cook Graders was given to plaintiff by Exhibits 11 and 12 and by the sworn answer of these defendants filed herein, all prior to October 1, 1931, and on the ground that the commencement of this suit was an election to treat the contract as breached and to [110] collect full damages for the period plaintiff claimed the absolute right to keep said contract in force, and on the further ground that there is no evidence in the record to sustain any finding of general damages in the sum of $5,000.00 or in any other sum.

VIII.

These defendants object to that part of proposed Finding XVIII beginning with the words "the facilities available" in Line 4 of page 16, to and including the words "machines heretofore sold" in Line 11 of page 16, on the ground and for the rea-

son that the same is not sustained by the evidence and is contrary to the evidence.

IX.

These defendants object to that part of proposed Finding XVIII beginning with the words "by reason of the defects" in Line 11 to and including the end of said proposed Finding XVIII, on the ground and for the reason that the same is not supported by any evidence in said cause and is contrary to said evidence.

CONCLUSIONS OF LAW.

These defendants object to proposed Conclusion of Law I and the whole thereof on the following grounds:

(a) That said Conclusion of Law is against the law and that under the evidence in this cause plaintiff is entitled to recover nothing from these defendants.

(b) That said Conclusion of Law does not comply with the decision of this Court on the exceptions to the Master's Report in that it fails to allow these defendants credit for the sum of $1,536.57 paid by these defendants to the plaintiff and particularly disallows an item of $291.53 paid by these defendants on the written contract of May 4, 1928.

(c) That there is no evidence supporting or tending to [111] support the allowance of the sum of $12,035.38 as damages or the allowance of any sum, and particularly no evidence warranting the allowance of $7,035.38 an alleged difference between

the sum of $15,000 and $7,964.62 found as payments made to the plaintiff on account of said written contract of May 4, 1928, and likewise there is no evidence supporting or warranting the allowance of $5,000.00 as general damages to said plaintiff:

II.

These defendants object to proposed Conclusion of Law II on the ground that the same is against the law.

That in connection with said cause and the decision thereof, these defendants request the Court to make the following Findings of Fact in lieu of the Findings of Fact proposed by plaintiff, which have previously been objected to herein by these defendants:

(a) That in the accounting between the plaintiff and the defendants the sum of $1,245.04 paid to plaintiff by the defendants Cutler was paid under an oral contract independent of the contract sued upon, which oral contract was that the said Cutlers would pay to the plaintiff 15% commission on all orders for machinery other than Cook Graders secured by the plaintiff in the Medford District during the year 1928.

(b) That during the period between May 4, 1928 and May 1, 1929 the Cutler partnership paid the plaintiff the sum of $6,751.76 of which $1,245.04 was paid on said oral contract, leaving a balance paid during said period on the contract sued on of $5,506.72.

(c) The total payments by the Cutler partnership and the Cutler corporation to plaintiff under the contract sued on were $8,256.15. [112]

(d) That the total amount of royalties and commissions due plaintiff under said written contract of May 4, 1928 was the sum of $7,089.43, and the Cutler partnership and the Cutler corporation overpaid the plaintiff $1,166.72.

(e) That prior to the filing of the complaint herein the Cutler partnership and the Cutler corporation notified plaintiff orally and in writing that they considered the contract of May 4, 1928 terminated and that they would not proceed further with the manufacture of Cook Graders, that by the sworn answers of the defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc. filed on or about February 20, 1931 similar written notice was given to plaintiff; that prior to the 1st day of October, 1931 plaintiff had full knowledge that the Cutlers as individuals and the Cutler corporation looked on the contract as terminated and that they did not intend to and refused to perform it further in any respect then or at any time in the future.

CONCLUSIONS OF LAW

(a) That plaintiff is not entitled to recover anything from any of the defendants and that defendants F. W. Cutler and Asa B. Cutler are entitled to recover from plaintiff the sum of $1,166.72.

(b) That defendants are entitled to recover their costs and disbursements in this suit.

(c) That the Master's compensation of $..... for his services and $25.00 for his expenses shall be paid by plaintiff. [113]

OBJECTIONS TO PROPOSED DECREE

These defendants object to the rendering or entering of the decree herein proposed by plaintiff, on the following grounds:

(a) That under the pleadings and evidence plaintiff is entitled to no recovery against any of the defendants, but on the contrary the defendants F. W. Cutler and Asa B. Cutler and the Cutler Manufacturing Company, Inc. a corporation, are entitled to recover from plaintiff the sum of $1,166.72, and their costs and disbursements, and the remaining defendants are entitled to recover of and from plaintiff their costs and disbursements.

Respectfully submitted,

JOHN F. REILLY
JAMES G. WILSON
Solicitors for Defendants.

[Endorsed]: Filed December 20, 1933. [114]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of December, 1933, the same being the 37th Judicial day of the Regular November Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: **[115]**

[Title of Court and Cause.]

ORDER OVERRULING OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above matter coming on for hearing on the objections of the defendants, F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., a corporation, to the Findings of Fact, Conclusions of Law and Decree proposed by plaintiff, and on the Findings of Fact and Conclusions of Law proposed by said defendants,

IT IS NOW ORDERED that said objections and each and all thereof be and the same are hereby overruled and disallowed and said Findings of Fact and Conclusions of Law proposed by said defendants are and each of them is refused and exception is allowed to said defendants as to the ruling of the Court on each of said objections and each of said requests for Findings and Conclusions of Law.

Dated this 20th day of December, 1933.

JOHN H. McNARY,
Judge.

[Endorsed]: Filed December 20, 1933. [116]

AND AFTERWARDS, to wit, on the 20th day of December, 1933, there was duly filed in said Court, and entered of record therein, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [117]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause, being at issue on the pleadings, was referred by the court to the Honorable Robert F. Maguire, the Standing Master in Chancery. The case was then tried before the said Master, who thereafter submitted to the court his Report. Within the time allowed by the rules and orders of the court all parties filed exceptions to said Report. Plaintiff filed three exceptions; defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., filed seven exceptions; and defendant Food Machinery Corporation filed one exception. The exceptions thus filed were heard by the court on oral argument and written briefs by all parties. The court after due consideration of said Report and the exceptions thereto, and having ruled and determined that all exceptions of defendants to said Report should be overruled and that plaintiff's Exception No. I should be allowed [118] in part, makes the following

FINDINGS OF FACT

I.

At the time of the commencement of this suit plaintiff was a resident and citizen of the State of

Oregon, and defendant Food Machinery Corporation was a corporation organized and existing under the laws of the State of Delaware, and was a citizen and resident of the State of Delaware. The matter in dispute between plaintiff and defendant Food Machinery Corporation exceeds the sum of $3,000, exclusive of interests and costs. A complete determination of the controversy between plaintiff and defendant Food Machinery Corporation can be had without the presence in this suit of any of the defendants other than defendant Food Machinery Corporation. Said controversy between plaintiff and defendant Food Machinery Corporation is separate and distinct from any controversy between plaintiff and any other defendant, and said controversy between plaintiff and defendant Food Machinery Corporation is wholly between citizens of different states, to-wit: between plaintiff, a citizen of Oregon, and defendant Food Machinery Corporation, a citizen of Delaware.

II.

Prior to the year 1927, plaintiff conceived and designed a device for grading fruit. The purpose of the device was to sort fruit according to sizes, in order to facilitate packing and marketing of fruit with uniform sizes in each container. During said period plaintiff developed the machine and sold several, particularly in the Medford district in Oregon, where [119] the machines were used primarily for the sorting of pears. When Cook entered the field there was practically no use of ma-

chines in sorting pears, and producers depended generally on hand sorting.

III.

On or about October 25, 1927, plaintiff was granted United States Letters Patent No. 1646951 on his device for grading fruit, designated as Cook Fruit Graders and Sorters; and thereafter on or about December 4, 1928, plaintiff obtained a reissue of said patent under No. 17149. After the date of said patent and during all times herein mentioned plaintiff was the sole owner of said patent and of the invention therein disclosed.

IV.

On May 4, 1928, and prior thereto, the Cook Grader, embodying the principles of said design, was being marketed by plaintiff in competition with other devices in the fruit industry, and plaintiff had an established business of marketing his graders.

V.

Prior to May 4, 1928, defendants Asa B. Cutler and F. W. Cutler were engaged in business in Portland, Oregon, as a partnership, doing business under the name Cutler Manufacturing Company (hereinafter sometimes referred to as the "Cutler partnership"). Said partnership was engaged in the business of manufacturing and distributing a wide variety of machinery for general use in the fruit growing and marketing industry throughout the world. The partnership had a vigorous and suc-

cessful business and, with its sales organization, was [120] in a position to obtain a wider and more profitable market for Cook Graders than plaintiff with his more limited means of financing and manufacturing, was able to accomplish.

VI.

On or about May 4, 1928, the Cutler partnership, as one party, and plaintiff as the second party, entered into a contract in terms as follows:

"THIS AGREEMENT made this 4th day of May, 1928, between Asa B. Cutler and F. W. Cutler, partners doing business as Cutler Manufacturing Co., of Portland, Oregon, hereinafter referred to as the company, and Floyd J. Cook of Medford, Oregon, hereinafter referred to as the second party, WITNESSETH:

"That in consideration of the agreements herein set forth, and of the execution of this agreement by the parties, the parties hereby agree:

"FIRST: Said second party hereby grants to the said company for the term beginning May 1, 1928, up to and including September 30, 1933, the exclusive right to manufacture and sell that certain fruit grading and sorting machine known as the 'Cook Grader,' and which is set forth and covered by patent number 1646951, dated October 25, 1927, granted by the government of the United States to said Floyd J. Cook, patentee, with all modifications, alterations, and improvements thereof, including attachments thereto or means

of delivery or receiving fruit sold in connection with the said Cook Grader. Said company during the said term will not manufacture any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as are now being manufactured by the said company.

"SECOND: The second party will at his own expense, diligently prosecute before the United States commissioner of patents, a reissue of the above named patent, and in the event of such reissue the said company is hereby granted the exclusive right to manufacture and sell machines under such reissued patent. If it shall become necessary or desirable to proceed against infringements against said patent or reissue thereof, or any modifications, alterations, or improvements thereof, suits shall be brought only by mutual consent of the parties hereto, and the cost and expense thereof shall be borne equally by the parties hereto. In the event suit is brought against the said company by third parties claiming that said Cook Grader infringes on patents held by said third party, the second party hereby agrees to defend said suits [121] at his own expense and to satisfy and pay any damages awarded against the said company in said suits, provided that the said second party shall have the right to require the final determination on appeal by a court of last resort, before he shall be required to pay or satisfy any such judgment.

"THIRD: The company agrees to manufacture said Cook Grader and to make such blue prints, patterns, jigs and designs as it shall deem necessary or convenient in connection with said manufacture, all of which blue prints, patterns, jigs, and designs shall be owned by the company; and the company shall manufacture such Cook Graders in such quantities and numbers and sizes as shall be reasonably necessary to supply the demand therefor, and the company further agrees that all such Cook Graders shall be manufactured from good materials and with good workmanship, in keeping with approved methods of mechanical practice and manufacture.

"FOURTH: Such Cook graders shall be placed on the market by the said company and its agents, and the company shall promote the sales of said Cook graders with the same diligence with which the company promotes the sale of any other machine or product manufactured by the said company, and shall advertise the same as 'Cook Fruit Grader' with the same diligence that the said company advertises any other product or machine manufactured by the said company, having in view the nature and extent of the markets for the respective machines.

"FIFTH: All orders for Cook graders in the hands of the second party at the date of this contract are hereby assigned to the said company, and the said company hereby agrees to assume all obligations of the second party on all said orders and to fill said orders promptly. It is understood

that all materials in the hands of the second party at the date of this contract, have been paid for by the second party, and that all labor employed for the manufacture of said machines by the second party, has been paid to and including April 28, 1928. All materials ordered by the said second party and not delivered at the date of this contract, are to be accepted and received by the company and paid for by the company. All payrolls accruing, beginning April 30, 1928, are to be assumed and paid by the company. The company hereby agrees to pay the second party for any and all material and parts for manufacture of said Cook grader and attachments, now in possession of the second party at Medford, Oregon, at cost to the said second party as shown by invoices or records in possession of second party, and in addition thereto all sums paid by the second party for labor in and about the manufacture of said Cook Fruit Grader and attachments, subsequent to January 1, 1928; and in addition thereto, the sum of $800.00 as salary of the second party from January 1, 1928 to April 30, 1928; and in addition thereto all sums expended by the second party subsequent to January 1, 1928, as traveling and sales expenses in furthering the sales of said Cook grader and attachments, and in addition thereto [122] such additional sums shown by the records of second party as having been expended by the second party in the manufacture and/or sale of said Cook grader and attachments subsequent to January 1, 1928. All the said sums to be paid by the company to the second party

hereunder, shall be paid in cash and shall not exceed in the aggregate more than $5,000.00. It is understood that since January 1, 1928, the said second party has been conducting his business under the name and style of Cook Manufacturing Company. The said second party shall, within ten days from the date of this contract, deliver to the company an inventory of material and parts for which payments are to be made to the second party, and a statement of all other amounts to be paid to the second party by the company hereunder, and the company shall have the right to inspect all records relating thereto, and the company agrees promptly to check said inventory and records and to pay the sums herein provided for, within five days after the delivery to the company by the second party, of said inventory and statement. In the event the parties hereto disagree relative to any item of material, labor, and expense, above set forth, the amount not in dispute shall be forthwith paid by the company to the second party, and the disputed items shall be referred to arbitration, each party to select an arbiter within five days from the delivery of said inventory and statement, and the two arbiters so selected shall select a third; and the company shall pay the amount of such disputed items to the second party immediately upon the making of the award by said arbiters.

"SIXTH: The company will pay to the second party in cash, as hereinafter specified, a royalty

of ten per cent of the amount of the sale price of all equipment sold by the company, it being understood that under no circumstances shall the royalty payable to the second party hereunder, be less than $50.00 for each fruit grader with a sizing portion of thirty feet or longer, with a minimum royalty for smaller machines in the ratio of the sales price of such smaller machine to the sales price of such machines with a sizing portion of thirty feet or longer. All royalties accruing hereunder to May 1, 1929, shall be due and payable to second party on May 1, 1929, provided the company shall pay to the second party the sum of $300.00 on the last day of each calendar month for a period of twelve months, beginning May 31, 1928. On May 1, 1929, if the royalties and commissions accruing hereunder shall exceed $3,600.00, the company shall pay to the second party the difference. If, on May 1, 1929, the royalties and commissions accruing hereunder shall be less than $3,600.00, the said sum of $3,600.00 shall be treated as guaranteed royalty and commissions by the company, to be retained by the second party, and the deficit between the amount of said royalty and commissions and $3,600.00 shall not be thereafter charged by the company against subsequently accruing royalties. All royalties accruing hereunder, beginning May 1, 1929, shall be paid by the company to the second party at the end of each calendar month, for all shipments and/or deliveries made by the com-

pany during [123] said month, within fifteen days from the end of each calendar month. Beginning June 1, 1928, and continuing during the term of this agreement, the company will deliver to the second party by the 15th day of each month, a written statement showing the amounts of sales, if any, during the preceding calendar month, names and addresses of purchasers, and the equipment shipped and/or delivered during such calendar month.

"In addition to the sums hereinbefore required to be paid by the company to the second party, the company will pay to the second party a commission of fifteen per cent of the amount of all sales of Cook graders and attachments thereto, in the Medford, Oregon district during the year 1928; the said commission to be paid on all orders accepted by the company, payment to be made on or before the first day of May, 1929, as hereinbefore provided; and the company will pay to the second party the further sum of fifteen per cent commission on all sales of equipment to Henry E. Kleinsorge of Sacramento, California, and the Earl Fruit Company of California, during the year 1928, provided that such commission shall not be paid on more than four Cook graders sold to the said two named parties; said payments to be made on May 1, 1929, as above provided.

"SEVENTH: In the event that the commissions for the year 1928 and royalties accruing hereunder to October 1, 1931, do not equal or exceed the sum of $15,000.00, then the company on

October 1, 1931, shall pay to the second party such sum as shall be necessary to bring the said total up to $15,000.00, provided that the company shall have the option to withhold payment of such deficit and cancel this contract by giving the second party notice in writing to that effect; and provided further that if the company shall not pay such deficit on or before October 1, 1931, then the second party shall have the right at his option to cancel this contract by giving 10 days notice in writing to the company to that effect; and in the event this contract is so cancelled by either party as herein provided, then said second party shall have the right to manufacture and sell machines, equipment, devices, and attachments, described in said patent or reissue thereof, and all modifications, alterations and improvements thereof without any claims in favor of the company therein or thereto, as fully as if this agreement had not been made.

"EIGHTH: If either of the parties shall fail to keep and perform diligently and punctually, any of the terms and conditions hereof, the other party shall have the right to cancel and terminate this agreement for such breach, provided that before such right of cancellation shall be exercised, the party asserting such breach and claiming such right of cancellation, shall give the other notice in writing specifying such breach with reasonable certainty, and the other party may within thirty days after receiving such notice, make good such breach. If the party receiving

such notice shall fail within such [124] period of thirty days to make good such breach, then the other party shall have the right to cancel and terminate this contract, but such cancellation shall not release the other party from any liabilities then existing hereunder.

"NINTH: This agreement does not require the said second party to render any service to the company except as herein particularly specified, and should the company require the services of the second party otherwise than as herein specified, then and in that case the second party shall be paid by the company for said services in addition to the other sums herein provided for, the sum of $350.00 per month.

"TENTH: At the expiration of this agreement or earlier determination, the second party shall have the exclusive right and ownership in all improvements, attachments, and designs relating to said Cook grader and attachment, developed hereafter, whether the same shall have been made by the company or the second party. In the event during the term of this agreement such improvements shall be made as shall be patentable or make an application for patent desirable, the expense of such application for patent shall be paid by second party and such application shall be made in the name of second party; and at the expiration or earlier determination of this agreement, the second party shall have the option for the term of thirty days thereafter to take from the company all patterns, blue prints, jigs, and de-

signs relating to the manufacture of said devices, and any modifications, alterations, or improvements thereof, at the cost to the company of such patterns, blue prints, jigs, and designs. At the expiration of this agreement or its earlier determination, the second party shall have the option for the term of 30 days thereafter to take from the company all machines then on hand and materials then on hand for the manufacture of such machines, at their cost to the company, and in such case the second party shall have the right to inspect all records of the company relating to the cost of such machines and material. If the second party does not exercise said option, then the company may complete machines then in process of manufacture and sell such machines and any other machines then on hand, provided that the total number of machines so to be sold by the company hereunder after termination of this contract, shall not exceed ten, and provided further that the company shall pay to the second party royalty on all such machines so sold as if this contract had not been terminated.

"ELEVENTH: If during the term of this contract the company shall sell its business, the second party shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights [125] hereunder and prevent any rights hereun-

der from passing to such purchaser from the company.

"IN WITNESS WHEREOF, the parties hereto have set their hands on the day and year first above written.

(Sgd) CUTLER MANUFACTURING CO.
F. S. Cutler
Asa B. Cutler
Floyd J. Cook"

VII.

The allegations in plaintiff's complaint, in substance, that defendants Asa B. Cutler and F. W. Cutler solicited the license to manufacture graders under the said Cook patent, by representing to plaintiff that they, the said defendants, controlled the manufacture and production of fruit grading machinery and could and would procure large scale production and sales of plaintiff's grader, are not true. The allegations in plaintiff's complaint, in substance, that said defendants solicited the license to manufacture graders under the said Cook patent by representing to plaintiff that if said license were not granted, they, the said defendants, would place on the market a similar machine which would interfere with plaintiff's trade and nullify his patent rights, are not true. The allegations in plaintiff's complaint, in substance, that from the beginning of negotiations for said license said defendants intended to undermine and destroy plaintiff's machine and business and suppress his products, in order that they, the said defendants, might market a

competing machine, are not true. The making of the said written contract of May 4, 1928, was not induced by fraud, misrepresentation, undue influence or other improper means on the part of the Cutler partnership. Until [126] early in the year 1930 the defendants did not breach the contract. The failure by the Cutler partnership to render the monthly statements called for by said contract, during 1928 and 1929, was acquiesced in by plaintiff.

VIII.

After May 4, 1928, and throughout the remainder of the year 1928 the Cutler partnership, in performance of its obligations under said contract, produced and marketed a fruit grading machine in all respects similar to that which plaintiff had produced prior to May 4, 1928. The machine thus produced and distributed is referred to hereinafter as the "Original Cook Grader." During the fruit harvest season of 1928, the Cutler partnership discovered what they considered to be operating defects in the Original Cook Grader. To eliminate these defects and to adapt the machine to the grading of lemons, the Cutler partnership conducted experiments during the late months of 1928. As a result of such experiments the Cutler partnership altered the design of the Original Cook Grader, and in January, 1929, began to manufacture and distribute to the trade a machine of the changed design. The machine as thus altered was designated by the Cutler partnership as the "Improved Cook

Grader," and will be so referred to hereafter. The Cutler partnership and its successor, Cutler Manufacturing Company, Inc., manufactured and distributed the Improved Cook Grader during the remainder of the year 1929 and thereafter until the time in 1930 when the partnership and its successor ceased all efforts to manufacture and sell Cook Graders, as will be hereinafter stated.

IX.

The changes of the design of the Original Cook Grader, embodied in the Improved Cook Grader, were made by the Cutler [127] partnership in good faith to overcome certain defects and difficulties encountered in the operation of the Original Cook Grader. The Improved Cook Grader was not inferior to the Original Cook Grader, but rendered results equally as good as those of the Original Cook Grader and avoided certain operating defects present in the Original Cook Grader. The acquisition by said defendants of rights under a so-called Palmer patent was done in good faith and for the purpose of avoiding possible suits for infringement thereof in the manufacture of Cook Graders. The Improved Cook Grader was not less efficient than the Original Cook Grader.

X.

In November, 1929, the defendants Asa B. Cutler and F. W. Cutler caused the organization of a corporation under the name Cutler Manufacturing Company, Inc. (hereinafter referred to as the

"Cutler Corporation"). On or about February 14, 1930, the Cutler partnership transferred to the Cutler Corporation all of the partnership assets, including the rights of the partnership under the contract of May 4, 1928, with plaintiff. On April 5, 1930, the Cutler Corporation gave plaintiff written notice that it had taken over the business and assets of the Cutler partnership. There is no evidence that plaintiff assented to this assignment or consented to the substitution of the Cutler Corporation for the individual liability of the Cutlers as partners. Prior to the institution of this suit, and in his complaint, plaintiff has at all times insisted that the Cutler Corporation as well as the Cutler partnership was bound to perform said contract of May 4, 1928. By said transfer and assignment the Cutler Corporation assumed the burdens as well as the benefits [128] of said contract of May 4, 1928. Plaintiff never agreed to release Asa B. Cutler and F. W. Cutler, or either of them, from their obligations under said contract, and did not agree or promise to look thereafter solely to the Cutler Corporation for performance of the obligations under said contract undertaken by the Cutler partnership, and did not consent to the substitution of the corporation for the individual liability of the partners.

XI.

On or about March 29, 1930, as a result of negotiations which had been pending since as early as September, 1929, a contract was entered into between the Cutler Corporation and defendant Food

Machinery Corporation for the sale and transfer of the business theretofore conducted in Portland, Oregon, by the Cutler partnership and the Cutler Corporation to said Food Machinery Corporation. In said transfer said Food Machinery Corporation refused to accept an assignment of the contract of May 4, 1928, with plaintiff, because it was then manufacturing and selling a competing machine, known as the "Clear Machine," and did not desire to be bound by the provisions of the contract of May 4, 1928, requiring exclusive production and sale of the Cook Grader. Plaintiff declined to consent to any transfer or assignment of said contract to Food Machinery Corporation unless that corporation should be willing to accept the contract in toto, including the provisions relating to exclusive sales of Cook Graders, and although Food Machinery Corporation was willing to accept the contract if the exclusive provisions thereof were eliminated with the understanding that the Cutler Manufacturing division would handle only Cook Graders, said Food Machinery [129] Corporation was unwilling to be bound by said exclusive provisions. On June 25, 1930, a bill of sale of the assets of the Cutler Corporation was given to Food Machinery Corporation, and said bill of sale expressly excluded the contract of May 4, 1928, with plaintiff. After June 25, 1930, the business theretofore conducted in Portland by the Cutler partnership and the Cutler Corporation was carried on under the name "Cutler Manufacturing Company—Division Food Machinery Corporation."

XII.

After February 14, 1930, the Cutler partnership and the Cutler Corporation ceased entirely to manufacture and distribute any Cook Graders, and made no pretense of performing their obligations to plaintiff under the contract of May 4, 1928, except to assemble parts then on hand and to sell the machines from parts so assembled, under Paragraph Tenth of the contract.

XIII.

During the year 1929, while Improved Cook Graders were in use by fruit producers, operating difficulties developed due to the slope of the sides of troughs through which the fruit moved in the sorting process. On that account some fruit jammed in the machines and was damaged. The Cutler Corporation, without cost to the users, replaced the troughs with troughs of lesser slope. The completion of said changes occurred at or near the time of cessation of production of Cook Graders, as hereinbefore stated, in the spring of 1930.

XIV.

On May 4, 1928, or within a short time thereafter, the Cutler partnership and plaintiff entered into an oral contract whereby the partnership agreed to pay to plaintiff a commission [130] of fifteen per cent of the sale price of all machinery and equipment produced by the partnership, other than Cook Graders, sold by the partnership in the Medford district in Oregon during the remainder of the year 1928. Said contract will be referred to as the

"oral contract" to distinguish it from the written contract of May 4, 1928.

XV.

Between the date of the written contract and May 1, 1929, the Cutler partnership paid plaintiff the sum of $6,751.76, of which $5,215.19 was properly applicable to royalties due under the written contract, as shown in the following table:

Total payments to plaintiff (Deft. Ex. 3)		$6,751.76
Deduct:		
(1) Commissions admitted by defendants to have been earned under oral contract (Deft. Ex. 3),	$1,245.04	
(2) Additional commissions earned under oral contract (as determined by Master),	291.53	
Total deductions		1,536.57
Net payments applicable on royalties under written contract of May 4, 1928.		$5,215.19

XVI.

During the period from May 1, 1929, to the cessation of production, the Cutler partnership and/or the Cutler Corporation paid to plaintiff to apply on royalties due under the written contract of May 4, 1928, the sum of $2,749.43. The total payments, then, by the Cutler partnership and the Cutler

Corporation to plaintiff to apply on royalties due under the [131] written contract were:

Payments prior to May 1, 1929,	$5,215.19
Payments after May 1, 1929,	2,749.43
	$7,964.62

XVII.

Neither the Cutler partnership nor the Cutler Corporation gave to plaintiff notice of cancellation of the written contract, as required by Paragraph Seventh thereof, the giving of which was the condition upon which said defendants were to be relieved of the obligation to pay the difference between $15,000 and royalties actually paid prior to October 1, 1931. In 1930 Cook had actual knowledge that the Cutlers as individuals and the Cutler Corporation had disaffirmed the contract, that they looked on it as terminated and that they did not intend to and refused to perform it further in any respect then or at any time in the future.

XVIII.

By the contract of May 4, 1928, it was contemplated that the Cutler partnership would produce and market Cook Graders at least until October 1, 1931, and, if the cancellation privilege reserved in Paragraph Seventh was not then exercised, until September 30, 1933. After January 1, 1929, the demand for Cook Graders decreased materially, due in part to saturation of the market in some districts and to the fact that business conditions in fruit dis-

tricts became such that prospective buyers were financially unable to purchase. By reason of the cessation by the Cutler partnership and the Cutler Corporation of production and sale of Cook Graders in the spring of 1930, the Cook Grader was taken from the market. Successful marketing of a device [132] requires continuous sales efforts to retain the good will of the product. Any suspension of sales requires the expenditure of efforts to reestablish the market greater than those necessary to maintain an established market. The facilities available to plaintiff individually to reestablish a market for his product were less adequate than the facilities of the Cutler Corporation and the Cutler partnership to maintain a market. The cessation of production in 1930 followed closely upon the discovery of operating defects in the Improved Cook Grader in 1929, and the changes made by the Cutler Corporation in the troughs of machines theretofore sold. By reason of the defaults of defendants the Cutler partnership and the Cutler Corporation, consisting of the cessation of the manufacture and sale of Cook Graders from and after the spring of 1930 (except the assembly and sale of parts then on hand), and the failure of said defendants to perform their obligations to manufacture and distribute Cook Graders for the full term specified in said contract, that is, until October 1, 1933, plaintiff has sustained general damages in the sum of $5,000.00.

XIX.

At the time of the purchase by Food Machinery Corporation of the business and assets of the Cutler Corporation, the said Food Machinery Corporation knew of the existence of the Cook contract of May 4, 1928, and knew that by said transfer the Cutler Corporation would be in a position so that it would be unable to perform its obligations to plaintiff under said contract, and knew that on account of the transfer of said assets the Cutler Corporation would be unable to perform said contract or pay plaintiff damages for default by it in performance [133] of said contract.

XX.

The Master was engaged for a period of fourteen days in taking the testimony in this case, two days in hearing argument of counsel, and ten days in the consideration of the testimony and briefs of counsel and in preparation of his report, a total of twenty-six days. He incurred $25.00 traveling expenses. Reasonable compensation to the Master is the sum of $1,250.00, for his services and $25.00 for his expenses.

And based upon the foregoing Findings of Fact the Court has arrived at the following

CONCLUSIONS OF LAW

I.

Plaintiff shall recover from defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., the sum of $12,035.38, computed as follows:

Difference between $15,000 and $7,964.62, royalties paid on account of said written contract of May 4, 1928,	$7,035.38
General damages,	5,000.00
Total,	$12,035.38

II.

Plaintiff shall recover his costs and disbursements herein from defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc.

III.

Defendant Food Machinery Corporation shall not recover [134] its costs and disbursements.

IV.

In the event that defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., shall not pay and satisfy said judgment and decree in plaintiff's favor, as indicated by a return of execution unsatisfied, plaintiff may levy execution to satisfy said judgment on any property of Food Machinery Corporation within this district, the title to which was in any of defendants Asa B. Cutler, F. W. Cutler or Cutler Manufacturing Company, Inc., and which was transferred to defendant Food Machinery Corporation as an incident of the transfer by Cutler Manufacturing Company, Inc., of its assets to defendant Food Machinery Corporation under that certain contract dated March 29, 1930, between defendant Cutler Manufacturing Company, Inc., and defendant Food Machinery Corporation.

V.

Execution shall issue to satisfy the judgment in plaintiff's favor.

VI.

The Master's compensation of $1,250.00 for his services and $25.00 for his expenses shall be paid by defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., with the same rights to the Master to be satisfied out of the assets of Food Machinery Corporation as are set forth in Conclusion of Law No. IV.

Dated December 20, 1933.

[Endorsed]: Filed December 20, 1933.

JOHN H. McNARY,
United States District Judge [135]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of December, 1933, the same being the 37th Judicial day of the Regular November Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [136]

In the District Court of the United States for the District of Oregon

FLOYD J. COOK,

Plaintiff,

v.

ASA B. CUTLER and FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as the John Bean Manufacturing Co., F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and CUTLER MANUFACTURING COMPANY, a division of Food Machinery Corporation,

Defendants.

DECREE

This cause came on to be heard by the Court on exceptions of all parties to the Report of the Honorable Robert F. Maguire, Standing Master in

Chancery, on July 31, 1933, and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED as follows, viz:

I.

Plaintiff shall recover from defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., the sum of $12,035.38, and his costs and disbursements taxed herein in the sum of $667.38.

II.

Defendant Food Machinery Corporation shall not recover its costs and disbursements. [137]

III.

In the event that defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., shall not pay and satisfy said judgment and decree in plaintiff's favor as indicated by a return of execution against said defendants unsatisfied, plaintiff may levy execution to satisfy said judgment on any property of Food Machinery Corporation within this district, the title to which was in defendants Asa B. Cutler, F. W. Cutler or Cutler Manufacturing Company, Inc., or any one of them, and which was transferred to defendant Food Machinery Corporation as an incident of the transfer by Cutler Manufacturing Company, Inc., of its assets to defendant Food Machinery Corporation under that certain contract dated March 29, 1930, between defendant Cutler Manufacturing Company, Inc., and defendant Food Machinery Corporation.

IV.

Execution shall issue to satisfy the foregoing judgment and decree in plaintiff's favor.

V.

The Master's compensation of $1,250.00 for his services and $25.00 for his expenses shall be paid by defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., with the same rights to the Master to be satisfied out of the assets of Food Machinery Corporation as are set forth in paragraph III of this decree.

Dated December 20, 1933.

(Signed) JOHN H. McNARY,
United States District Judge.

[Endorsed]: Filed December 20, 1933. [138]

AND AFTERWARDS, to wit, on the 21st day of March, 1934, there was duly filed in said Court, a Statement of the Evidence, in words and figures as follows, to wit: [156]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE

The following is plaintiff-appellant's condensed statement in narrative form of the testimony introduced upon the trial made in pursuance of Equity Rule 75(b) and lodged in the clerk's office for examination of defendant as provided by said rule:

COOK-CUTLER CONTRACT OF MAY 4, 1928.

FLOYD J. COOK,

as a witness for plaintiff, testified:

I received a letter from Cutler Manufacturing Company to myself, dated April 4, 1928, copy of which is marked Plaintiff's Exhibit 26 herein. I made reply thereto by letter dated April 9, 1928, copy of which is marked Exhibit 27 herein, and received reply from Cutler Manufacturing Company to myself by letter dated April 11, 1928, copy of which is marked Plaintiff's Exhibit 28. [157] As a result of this exchange of letters I came to Portland and called upon Mr. F. W. Cutler at the Cutler plant, 404 Mill Street. Mr. Cutler asked me if I wanted to sell my patent and I said I didn't think I did. He stated that he wished to fill out his line and take on a grader in the nature of mine, that he had looked into my patent and found the claims were very limited. He said they could use the Palmer patent and make one similar to mine to compete with it, but that they would rather have mine inasmuch as it had been on the market and been advertised and had a reputation. Whereupon I said that I might consider a royalty contract and we discussed matters of that kind. That is as near as I can remember the substance of conversation after four years. My recollection is that Mr. A. B. Cutler, brother of F. W. Cutler, was present at the conversation. That was our first talk. We negotiated over a period of several days and finally arrived at a sort of contract, or what we thought we could

(Testimony of Floyd J. Cook.)

make into a contract. Mr. Reilly, Mr. Cutler's attorney, was busy and at the suggestion of Mr. Cutler and Mr. Reilly, they employed Mr. Lester Humphreys to draw the contract. Lester Humphreys has since died. Mr. Humphreys was paid by the Cutlers. The contract dated May 4, 1928, as executed, was thereupon identified by the witness and it was agreed that the copy thereof attached to the pleadings of defendant as an exhibit was identical with the contract so identified. A copy of this contract is set out in the record in Finding of Fact No. VI. After the execution of this contract the Cutlers took over the entire business, machinery and parts as I had been conducting it theretofore at Medford and the parts in course of construction for the season of 1928. [158]

Exhibit 36 is a letter from the Cutler Manufacturing Company to Floyd J. Cook, dated May 7, 1928, a statement of assets and expenses of the Cook Manufacturing Company, in which name Floyd J. Cook was doing business as of April 30, 1928, assumed by the Cutler Manufacturing Company, and the voucher of the Cutler Manufacturing Company in payment to Floyd J. Cook for said assets and expenses assumed.

Exhibit 41 is a trial balance as of April 30, 1928, of Cook Manufacturing Company.

After the execution of the contract of May 4, 1928, as near as I can figure about the middle of September, 1929, I heard that the Cutler Manufacturing Company had joined the Food Machinery Company, substantially a combination of Anderson-

(Testimony of Floyd J. Cook.)

Barngrover, Stebler-Parker, Sprague-Sells, John Bean Manufacturing Company, and others, I guess.

Plaintiff's Exhibit 17 shows the names of the companies, all of which I had heard of before, except the Florida Citrus Machine Company. I thereupon consulted my attorney who advised me to call upon Mr. Cutler and ask him if such were the case, which I did. As I recall it Mr. Cutler told me that they had not joined the merger but were contemplating doing so. Whereupon I told Mr. Cutler that if they disposed of their business to anyone, they would be required—the purchaser would be required to perform my contract as set forth in paragraph eleven of the contract. I did not in that conversation know or ascertain that they had acquired the Clear patent.

At the time the business was turned over I turned over all the original plans of the patent and everything that was connected with the making of the Cook Grader. [159]

In January, 1930 I called at the Cutler plant to see Mr. F. W. Cutler. I went into his office and I think the first thing he said to me was that they were unable to sell, or they were not going to make any more Cook graders. In other words, that they were all through with me. Whereupon I got up and walked out of the office. I cannot place the exact time in the month of January this took place, except I would say it was between the middle and the latter part of the month. The conversation was very brief because when Mr. Cutler told me that he was not going to make any more of my machines, or could not sell any more, I got up and went out quick. That

(Testimony of Floyd J. Cook.)

was all there was to that conversation as far as I recall.

Q. You made no inquiry from him in the first place that caused that statement to come from him?

A. I presume I must have opened the conversation regarding my statement of account, or their plans, or some such a matter which brought forth the statement that he made to me. I don't recall just what it was. I opened the conversation.

On Cross-examination

the witness testified:

After the signing of the contract with the Cutlers I turned over my whole business to Cutler Manufacturing Company, all materials and parts that I had made during the winter and spring of 1928; everything that I had pertaining to the business that they wanted they took; they took my place in the business, so far as I was concerned. I stepped out of it.

Prior to the receipt by me of the Cutler letter of April 4, 1928, plaintiff's Exhibit 26, I had had previous discussions with them and had called upon them without their solicitation. As I recall the first time I was in there was in 1925 when I first [160] got the theory of the machine I showed them some plans, rough sketches, and tried to interest them in the development of it, of which I knew nothing. I next called upon them along in 1926 after having built some machines and had had some successful experience I again hoped to interest them. I might have called twice in the summer of 1926 but I don't recall

(Testimony of Floyd J. Cook.)

anything after that until the letter of 1928. I might have called once or twice in 1927 but I don't believe the subject of grader was discussed or attempt made to again interest them in the manufacture of the grader. All of these trips which I have mentioned, that is the two or three, I called specifically with the idea of trying to interest them in the development of the grader and at my own instance. Around the 1st of May, 1928, after the negotiations with the Cutlers had proceeded for several days and the matter of drawing the contract came up I think F. W. Cutler told me to go to your (that is, J. F. Reilly's) office. Your partner, as my memory serves me, was in Chicago and you yourself could not attend to the job, and I think either you or Mr. Cutler asked who my attorney was and I said Mr. Lester Humphreys and you said, all right, get him to do it. I don't believe you were present at the conferences or saw the contract unless it was after it was drawn. At that time Mr. Humphreys was my attorney. The contract was drawn by him at the instance of Mr. Cutler and paid by him. Mr. Cutler told me he would employ Mr. Humphreys to draw the contract and would pay for drawing it. He had been my attorney in other matters prior to May 4, 1928, and before coming to your (Mr. Reilly's) office I think I had talked over with him the fact that I had received a letter from Mr. Cutler in a general way but don't think I had talked over the details with him. If Mr. Reilly had been able to draw the contract I presume I would [161] have submitted it to Mr. Humphreys for his inspection and advice; I sub-

(Testimony of Floyd J. Cook.)

mitted the matter to Mr. Humphreys but think Mr. Cutler, during the preparation of the contract, went to Mr. Humphreys' office at least once before the signing of the contract, the contract followed and was the result of several conferences covering I imagine a week.

By the end of the 1928 season the Medford field was pretty well supplied with Cook machines; there were, however, some sales to be made there; I presume there could have been six or eight or ten put out; I intended, however, to branch out and come to Portland and establish a plant of my own. I am not prepared to say what the condition at the end of the 1928 season was in other pear districts, except I made a trip to Wenatchee, Washington, in the early part of 1928. I found it was not customary to use graders for pears there; apparently during the 1928 and 1929 seasons the Cutlers pushed the sale of Cook graders with the same degree of diligence that they applied to selling their other equipment.

On Re-direct examination,

the witness testified: his knowledge of market for graders and sizers through the fruit raising districts of the United States limited to the years '30, '31, and '32 was confined to an estimate of the production of pears and other fruits that would be used on those graders, the possibilities of sales in those districts where they are raised best, on the sales made in the districts such as Medford, and the possible sales that might be made where this amount of fruit was being grown and shipped; personal knowledge

(Testimony of Floyd J. Cook.)

I have not. I looked up and generally acquired knowledge of the production and growth of the packing industry with respect to pears.

On Re-cross Examination,

the witness testified:

I have no knowledge of the pack of pears in 1928 as compared with 1929, or the pack of 1929 as compared with 1930 or [162] 1931; like all industries the fruit growers ability to pay for grading machines in 1930 and 1931 was curtailed, to what extent I do not know.

F. W. CUTLER,

as a witness for the defendants, testified:

The contract of May 4, 1928, as attached to plaintiff's complaint and as set out in Finding of Fact No. 6, was identified by the witness as the contract between myself and Asa B. Cutler on the one hand and the plaintiff on the other.

Negotiations leading up to the execution of this contract started about the middle of April, 1928, a few days subsequent to a letter written by Mr. Van Wyk to Mr. Cook at Medford. Mr. Cook visited at my office in Portland and my recollection is that after the first conference Mr. Cook returned to Medford and in a few days or about a week later he came back to Portland and called at my office. We met that evening in the office of the Republican

(Testimony of F. W. Cutler.)

State Committee in the Imperial Hotel, that was about a week prior to May 4th. There were conferences held at very frequent intervals thereafter and the last three or four days prior to May 4th they were daily and sometimes twice a day. The last matter discussed, as I recall, prior to the execution was on May 2nd. We had apparently threshed out the many ramifications of the contract and Mr. Cook left my office with notes to take back to his attorney for the drawing up of the contract. On the morning of the 3rd he came to my office, much to my surprise, and said that he had discussed the proposed agreement with his attorney and a point had been called to his attention that he wanted to take up with me before he went on with the contract. Mr. Cook said "There is no minimum provided, minimum royalty provided in the contract. You don't have to pay anything if you don't make sales, and there is nothing in the contract about your selling out to anybody. Where would I be if you [163] should sell out to somebody?" I cannot give you exactly word for word the conversation, but what I have said is the substance of was was said there. I recall distinctly Mr. Cook saying, "Well, the way the contract is agreed on now all you have to do is incorporate and you could get out of it and shelve me." I said, "Well, Mr. Cook, if you have—in the first place, I don't think we could ever get away with anything like that, because it would appear to me to be collusion just simply to

(Testimony of F. W. Cutler.)

avoid the contract; I don't think we could get away with it legally, but in the second place, if you have any such lack of confidence in us as to think that we would try to pull a think like that after making a deal with you, why, we better not deal at all." "Well, he said, "that is all right, but my attorney said we ought to have something in there about your selling out to somebody." I attempted to dissuade Mr. Cook from going further with the negotiations, because it had been drawn out so long as it was I was getting to—being busy—to an end of patience in the matter in a way. I didn't think it was necessary; I assured him that we had no intention of selling out, had no plans for such a thing, but he still persisted in some clause that would give him what he thought he should have. I said, "Well, now, it is all right with me, then, if you will have your attorney add a clause to the agreement we have now got that if you don't like any purchaser—anybody that we might sell our business to" —he brought that point up before, that he might not like the next fellow; he had confidence in us, but he might not like the purchaser—I said, "If you can't make a deal with the purchaser and don't like him, you can put a provision in the contract that you can take your rights back under the license, under your patent." [164]

Q. Let me ask in that discussion on that subject whether there was anything said on the subject of your right to sell unhampered by the contract, or was that any part of the conversation?

(Testimony of F. W. Cutler.)

Thereupon objection by counsel for plaintiff was made that the answer called for testimony that modified or changed the written agreement, and was sustained by the Master. Over the objection by plaintiff and the ruling of the Master the following proceedings were had, all subject to the objection:

Q. (By Mr. Reilly) Let me direct your attention particularly, Mr. Cutler, to the question of whether there was any discussion as to any effect that clause should have upon your right to sell unhampered by anything——

A. There was no such discussion indicating that we would have a bar upon our being able to sell out.

Q. Well, was there any discussion to the contrary then?

A. Nothing to the contrary.

The MASTER: Well, was the thing discussed at all either way?

A. The discussion, as I have already testified, was that we did not expect to sell out, but there was no discussion that there was a bar being planned for that contract.

The MASTER: Well, I know that, but was there any discussion to the effect that you should have the right to sell out if you desired?

A. I don't know as I get the import of your question.

The MASTER: Was there any discussion in which you claim it was agreed that you should have the right or retain the right to sell without reference to this contract?

(Testimony of F. W. Cutler.)

A. Our conversation was based upon the assumption that we might sell.

Mr. REILLY: That doesn't answer the question.

The MASTER: Let me put it this way: Have you already stated [165] your recollection of the entire conversation upon this particular subject?

A. I think so.

The MASTER: All right. I think that answers my question.

During the negotiations leading up to the signing of the contract of May 4, 1928 I think I saw Mr. Humphreys once at his office along towards the end of the negotiations. That contract was drawn up without any direct consultation between myself and Mr. Humphreys except through Mr. Cook as an intermediate. With reference to the payment of Mr. Humphreys as I recollect Mr. Cook came to us after the contract was closed and executed after May 4th on the ground that we had gone to you (Mr. Reilly) to have you draw it up in which event we would naturally have borne the expense, and in view of the fact that our attorney was out of town and another one had been substituted that we should pay it anyway; we said all right we would do it; Mr. Humphreys had never been our attorney; I had never seen him before or since. It was admitted in the record that Mr. Humphreys died on May 14, 1929.

F. W. Cutler testified:

The execution of the contract of July 23, 1929 (the earliest document executed relating to the sale of the Cutler business to the Food Machinery Cor-

(Testimony of F. W. Cutler.)

poration), made no change whatever in our efforts to sell the Cook Graders; we continued to sell them wherever sales were possible with every facility we had in our organization; we continued to do this throughout the year 1929, throughout January and February and portion of February at least in the sale of machines in Southern California; we made some sales of lemon machines as late as May 24, 1930, one pear machine in Hood River in August, and another in Hood River in September, 1930; those orders were solicited and obtained by the successors of the [166] partnership; they were manufactured under the arrangement made by F. W. Cutler and Asa B. Cutler with the succeeding companies whereby the remaining parts left on hand in the inventory of the Cutler Manufacturing Company, a partnership, sold to Food Machinery Corporation were used up and the succeeding companies were to make any profit they could out of the assembling of those parts into the Cook Grader and they were to pay to F. W. and A. B. Cutler the amount of the royalties which we were obligated to pay to Mr. Cook; these machines were limited to the number of ten to make up the parts left on hand by our contract with Mr. Cook.

On Cross-examination

F. W. Cutler, witness for defendants, testified:

I do not recall what the objectionable features were in Mr. Humphreys' preliminary draft of the contract. Cook came to my office and called my atten-

(Testimony of F. W. Cutler.)

tion to the omission of the matters contained in clause eleven; the language of that clause was framed by Mr. Cook's attorney. I don't recollect having anything to do with the drafting of it. I drew up some notes for the contract in the first place and as I recall when Mr. Cook was in Medford I sent him a letter with a synopsis or memorandum of the discussion that had taken place with him on his visit here. Defendant's Exhibit 61 consisting of three sheets was the letter and memorandum of the contract sent to Cook at Medford after his first discussion; the letter is dated April 24, 1928.

The Food Machinery Corporation by verbal agreement with A. B. Cutler and myself sold some Cook graders in 1930. They retained the proceeds of the sales except that it paid to us the amount of royalty that we were in turn obliged to pay Cook under our contract. The Food Machinery Corporation had already paid for the remaining parts on hand as a part of the transfer of the Cutler [167] business to that company, on the assumption and under the agreement that they would use them. A. B. Cutler and myself had no facilities for carrying out the assembling of those parts. The Food Machinery Corporation made the entire profit on the sale except so far as the royalty was paid to us for transmission to Cook and the cost of the parts. There was no memorandum of that agreement. That arrangement was made here in Portland. It was not necessary to take it up with San Jose.

With reference to service of notice on Cook of the termination of the agreement, there was a verbal

(Testimony of F. W. Cutler.)

notice between Cook and myself in January, 1930, as far as we personally were concerned, as testified by Cook yesterday, and Cutler advised Mr. Cook by letter on April 5th, 1930. The letter of April 5, 1930, plaintiff's Exhibit 12, is addressed to plaintiff, signed by "Cutler Manufacturing Co. Inc., by A. B. Cutler, President" and reads:

> "We desire to give you notice that the Cutler Manufacturing Company, Inc. has taken over the business and assets of the Cutler Manufacturing Company, co-partnership."

This letter was written simply to advise Cook of our plans and what we were doing. It was my idea that Cook would have the right to cancel his contract if we sold out. You will recall in my testimony this morning I said I discussed that matter with Cook as to our incorporating and he stated we merely incorporated to get out of the deal. We had incorporated in this case here but we didn't intend to get out of the deal. The purpose of the letter was to tell Cook he would have the right, if he wanted, to cancel the contract. It was up to him. If he didn't cancel it the Cutler Manufacturing Co., I believe, would have to carry it along. There was a doubt in our minds as to what would be the legal—we are not lawyers. I don't know the legality of the thing but I was simply trying to [168] give the procedure of what was going on. As late as April 5, 1930, we were in doubt as to whether there had been a termination of the contract between Cook and Cutler Manufactur-

(Testimony of F. W. Cutler.)

ing Co., a co-partnership, or not. We had not been advised by Cook that he would cancel if we incorporated ourselves but we had been advised by him very definitely he would not go on with the Food Machinery Corporation. That was brought up in the conversation in September, 1929, when Mr. Cook came to my office and not stated then that it was yet to be determined which machine—in the event we did finally sell to the Food Machinery Corporation it would be a matter between the choice of the Clear machine and the Cook machine as to which would be manufactured, and that although I was not the one to make the choice I rather thought it would be the Clear. And Cook said he would not permit the making of a Cook machine under our contract by this division if the Clear machine was going to be retained and built by the Food Machinery Corporation. In other words, as I understood him to say, he would insist upon the exclusive feature of his contract.

With reference to the conversation in January, 1930. I had been down in San Jose several times between the September conversation and the one in January. It had been definitely decided by the Food Machinery Corporation engineers and officials that they would not manufacture the Cook machine; didn't care to take on this contract that we had here and I advised Cook of that decision. The conversation was very short and he left shortly.

MASTER: That is what I still don't quite understand. If when you had that conversation in

(Testimony of F. W. Cutler.)

January, which so far as he was concerned and you were concerned seemed to put a termination to the arrangement, what was the necessity or purpose or object of [169] this letter of April 5, 1930?

A. Well, we had not been advised in writing; we didn't know whether Mr. Cook would go on with it—he was hostile at the time. We had the right to manufacture ten machines under the contract and continued to do so. The letter of April 5, 1930, was written by defendants' attorney.

On Cross-examination the witness

FLOYD J. COOK

in rebuttal, testified:

It is difficult to say how many times I saw Mr. Humphreys in the progress of negotiations for the May 4th contract from the time I received the first letter from the Cutlers. I presume that I had seen him every day that I was here in town; it would be natural that I would; I was interested and here for that purpose.

Q. And you would go and discuss things with the Cutlers, and then you would go back and discuss them with Mr. Humphreys?

A. On several occasions I believe I did that; yes, sir.

Q. And Mr. Humphreys would tell you what to stand out for and what to withhold on?

A. Yes, sir.

(Testimony of Floyd J. Cook.)

Q. And you stated that you demanded that paragraph 11 be put in?

A. Yes, sir. It is my recollection that the putting in of paragraph 11 was the last thing done before signing; there was a conversation in which I demanded that some such clause be put in the contract before paragraph 11 was actually drafted and I had some conversation with Mr. Cutler as to what he was willing to do in that respect before paragraph 11 was actually drafted; and then I went to Mr. Humphreys and told him of the agreement that Mr. Cutler and I had reached in that respect; and it was on information furnished by me to Mr. Humphreys that he drew this paragraph 11 and after the paragraph was thus included the contract was signed. [170]

AGENCY CONTRACT.

Cook, as a witness for plaintiff, testified: That after the contract of May 4, 1928 was signed I was appointed Cutlers' sales agent in the Medford territory for the season of 1928.

On Cross-examination, plaintiff testified:

Q. (By Mr. Reilly) Now during 1928, after this contract was put into effect, Cutler Manufacturing Company manufactured and sold the Original Cook; is that right?

A. Yes, sir.

Q. And you were their agent?

A. In the Medford territory.

F. W. CUTLER,

witness on behalf of defendants, testified: The arrangement made with Mr. Cook with reference to commission on equipment other than Cook graders was made shortly after May 4th; it was a verbal arrangement made by Mr. Cook and myself and Mr. Van Wyk, the sales manager; on the basis of it he was going to be in the Medford district selling Cook apparatus, Cook Graders and connecting links, and at the same time he had just as well represent us on the sale of other equipment other than Cook, and it was agreed that whatever orders he would get he would get 15% commission on them; it was limited to orders that he would take; we did not at any time agree to make him our exclusive agent in the Medford district for anything; at that time Mr. Cook, as I recall it, told us that he was not going to be there all summer.

On Cross-examination,

the witness testified: That Cook was to receive 15% commission on any equipment that we manufactured and sold other than the Cook equipment which was already provided for in the contract for which he obtained orders from customers. If we received orders that he had not obtained he was not to be allowed a commission. By the words exclusive agent I [171] meant that the arrangement with Cook would be contrasted with the arrangements which we have with permanent agents who are in the districts from year to year, and with whom we make what we call an exclusive agency arrangement, whereby they get a commission on all sales that are

(Testimony of F. W. Cutler.)

made of all equipment in their territory, whether the order comes from the customer direct to us or whether the agent goes out and gets the order and sends it to us; I don't believe that any such arrangement was made with Cook. The arrangement, as I recollect it, was that he should obtain commission only on orders he got from customers; I think it is very possible that during the course of the transactions in the Medford district we did allow Cook commissions in some instances for orders that he did not personally obtain; that would be likely under the policy that we usually follow in connection with agents; if we were convinced that an order which came direct to us was really attributable to efforts which had been made by Mr. Cook we certainly would give him the commission. I assume Mr. Cook sent us reports of sales made by him from time to time; I did not personally receive them; any orders that he obtained on our order form would be presumably in his handwriting, made out by himself, and there is a space provided in the upper right hand corner, I believe, for the salesmen to enter his name, and orders which he obtained should have his name on them; I have not gone over his orders in detail as to identify Mr. Cook's orders; we sometimes received orders by telephone and occasionally by telegraph; the salesmen would invariably, or most certainly should, write us in connection with any such order; if he didn't we wouldn't know where it came from and the chances are he wouldn't get credit.

(Testimony of F. W. Cutler.)

In the case of an order by telegraph or any other way than by a signed order with the salesman's initials on, unless we [172] knew from conversation with him in the past, or letters that had already come in, that he was working on that customer for that particular thing I don't believe he would be credited with the commission. I personally may have had conversations myself with Cook as to sales he made at Medford during the season for which he was employed but I do not recall them now. In swearing to the answer of the Food Machinery Corporation as to the amount earned by Cook outside of the machinery manufacturing contract I relied upon accountant we had, Mr. Van Wyk. He determined the amount due Cook. As to the details of commissions, we were very conscientious in going through our records to find each and every transaction we thought was attributable to Cook as far as commission is concerned, or which under the contract he was entitled to royalty on. We had no thought of trying to beat him out of anything. I do not recall myself any agent aside from Cook we had in the Medford district during the period Cook was to receive 15% under the verbal contract. I do not know of any letters written him defining any limit on his agency. If any such letters were written Mr. Van Wyk would know of them.

On what we allowed Cook our contract was our guide. The payments to Cook for commissions on equipment outside of the manufacturing contract were necessarily connected up with the payments

(Testimony of F. W. Cutler.)

that were due him under the contract by virtue of the contract that Mr. Van Wyk testified to yesterday. We made an advance payment in August, 1928, to Cook of $1000. not specifying particularly what it was about, although he did say it was for commissions. That was the discussion that preceded it but it went in as a charge on his account.

The allowance made Cook outside the manufacturing contract was based on whether Cook actually sent the order in or [173] whether we were convinced he was responsible for that sale. Where there was a doubt, where he didn't actually have his name on an order, verbal or written evidence that he was actually entitled to it, then we had to use our judgment.

If commission has been allowed to Cook on the report which was made by Mr. Van Wyk with respect to any certain sale of other than Cook equipment in Medford, I assume that there must be evidence in our files to indicate that the order was taken by Mr. Cook, or that he was responsible for its coming to us; and that any orders from Medford on which Cook was not allowed a commission it would necessarily follow there was no evidence of it having been obtained by Cook. My understanding of the arrangement with Cook was that he was not to have any commission on anything unless he obtained the order himself.

PAUL VAN WYK,

witness for defendant, testified that Floyd J. Cook was to be the agent of the Cutlers in the Medford district or at Medford for the year 1928 which would mean that he would sell any Cutler equipment and receive a commission on it in that district regardless of whether it was Cook graders or not. The witness testified that in his position as sales manager for defendants, he made his estimates for future business on various bases, adding, "As I said before, we rely principally upon our agents' estimates." He stated further that Floyd J. Cook was the agent in Medford upon whom he relied for estimates on fruit grading machinery.

I was present and took part in the arrangement which was made with Mr. Cook for acting as an agent of the Cutlers at Medford from May, 1928, to May, 1929. That arrangement occurred shortly after the signing of the contract of May 4th. The entire arrangement was a verbal one, Mr. Cook, Mr. F. W. Cutler and [174] myself, between the three of us, and Mr. Cook, at that time was granted the privilege of selling other equipment than covered by the contract and it was agreed that he would receive a commission on all sales made by him in the Medford district during that period.

Q. Was there any agreement to pay him commission on all sales made in the district, whether made by him or not?

A. No, there was not, for this reason: that Mr. Cook mentioned at the time that he was busy with other matters, I believe it was politics, particularly,

(Testimony of Paul Van Wyk.)

and that he would not be able to service machines, or anything of that character; but this matter being only for one year, that all he would be able to handle is the sales which would be made in conjunction with the sale of Cook Graders. The fact of the matter is along those lines that Mr. Cook wanted to be sure that he would not be called to give service, and that if he should,—he anticipated that in advance of the contract,—that he would be paid, as I remember it was stipulated, $325.00 or $350.00 a month, should he be called upon to do any work for us in the Medford district.

On Cross-examination,

the witness testified:

We never paid him $350.00, we did not call on him for any work other than sales; I personally do not know whether Cook saw every single man in the Medford district to whom any sales of any kind could be made; we have to leave those things to our agents. We assume they cover the trade thoroughly. I have no reason to believe that Mr. Cook did not. We have no knowledge of what Mr. Cook did with reference to soliciting the trade; that is something Mr. Cook did but I would not have any knowledge of it. I can recall only one instance where we were told by the [175] customer that Mr. Cook had seen him before giving the orders, the customer wanted to be sure Mr. Cook got the commission on the order.

FLOYD J. COOK,

the plaintiff, called as a witness for plaintiff in rebuttal, testified with reference to the agency contract for the year 1928.

Q. (By Mr. Bristol) In order to obviate any more talk by Mr. Reilly, particularly, you just state what that arrangement was and what the Cutlers did about it and told you they would do?

Mr. REILLY: That is objected to insofar as it calls for him to state his conclusion as to what the arrangement was.

Mr. BRISTOL: That was the Master's own question.

Mr. REILLY: I can't help it whether it was the Master's own question or not. The only thing that would be admissible would be the conversation. It is for the Court to determine what the legal effect of those conversations was.

The MASTER: He may testify as to what was said and done between them, what was said and done between them with regard to this arrangement. I think if you let him tell that you will have the whole thing.

A. It was my arrangement, understanding and agreement of that appointment as agent——

Mr. REILLY: Just a moment. That is objected to, for it is the very vice that I am objecting to.

The MASTER: What did they say to you and what did you say to them about the commission agreement, in substance?

(Testimony of Floyd J. Cook.)

A. They appointed me their agent to act in the Medford District for the season and agreed to pay me a commission of fifteen per cent on all sales made in that district by the company. Now, in [176] explanation of that, if Mr. Reilly will permit me, I want to repeat two or three things. In the first place,——

Mr. REILLY: Are these conversations?

A. No.

Mr. REILLY: Then I object.

Q. (By Mr. Bristol) Well, are they things that you told Cutler?

A. And Cutler told me.

Mr. BRISTOL: Well, that is what he asked you, if they were conversations.

A. I wasn't going to repeat the conversations. They were the result of conversations.

Mr. REILLY: We don't want the result of conversations. We want the conversations.

The MASTER: What was said and done, as near as you can recollect, about the royalty on the sales of the Cutler people in the Medford district for the year 1928?

A. I explained to Mr. Cutler that I was a delegate for the Republican National Convention; that I expected to be gone during the entire month or the best part of the month of June; that I probably would be engaged in conducting the presidential campaign in the fall and would not be in Medford much of the time; that I personally knew every packing house manager and owner in Medford; that

(Testimony of Floyd J. Cook.)

many of them were under obligations to me for favors at different times; that I would call upon them and state to them that I was the agent of the Cutler Manufacturing Company and that any business that they sent to the company, either through me or directly, would be credited to me on my commission account. I subsequently called on those dealers and told them that. [177]

I left Medford the early part of June and returned the latter part of June, 1928.

With reference to the payment of $1000.00 to me on August 31, 1928, I state that while I had been gone in the East, a number of orders totaling, as near as I can remember it, around forty-five hundred or five thousand dollars had been received by the company through the efforts that I have just outlined here, and that I asked for a statement of those accounts and a settlement. They told me that they hadn't had time to make up the account and didn't like to stop to do it in the middle of the busy season, and after considerable pressure I got the check of $1000. out of them on account of those sales. My talk was with F. W. Cutler and the check of August 31, 1928 was given me by direction of F. W. Cutler. I would not say that this payment was made with sole reference to sales commission of 15%. It was a payment on account of what they owed me at that time, of all items of every nature, whatever I had coming to me; that was a payment on account of whatever I might have had coming to me at that time. I did not have at that time any statement of my royalties accumulations earned up to August 31, 1928.

(Testimony of Floyd J. Cook.)

On Cross-examination

the witness testified:

I had been getting my $300.00 a month right straight along. I understood in August there had been made $4500 or $5000 in sales outside the contract of May 4, 1928; that would mean a commission of $750.00 if the sales outside the contract were $5000. I understood when I returned from the East in June that sales in the neighborhood of $5000 had been made. I ascertained this in a general way when I went to the Cutler Manufacturing plant on my way to Medford in the latter part of June. My solicitation of the packing trade before I left for the Republican Convention was that I called upon each and every one of them whom I knew per- [178] sonally and stated that I was agent for the Cutler Manufacturing Company, and that in my absence, or under any circumstances, that any orders they chose to give to the Cutlers would be credited to me. That is the way I solicited the business, on that basis. And I think it was understood by Mr. Cutler that by reason of my acquaintance and influence with those men that it might increase the chances of his getting a certain amount of business whether I was there or whether I was not, that my friendship and influence with them would cause them to buy washers and things of that sort.

(Testimony of F. W. Cutler.)

TRANSFER OF BUSINESS FROM CUTLER, COPARTNERSHIP, TO CUTLER, CORPORATION, AND TO FOOD MACHINERY CORPORATION.

F. W. CUTLER,

called as a witness for plaintiff, testified:

On May 4th, 1928, at the time of the Cook contract Cutler Manufacturing Co., composed of the partners, was in no way connected with the John Bean Manufacturing Co. and did not handle any of the John Bean products up here. The Cutler copartnership at said time was in no manner connected with the Anderson-Barngrover Mfg. Co. nor Sprague-Sells Corporation, nor with Bean-Stebler System. The first business connection, if by that term is meant negotiations between any of said persons and the Cutler copartnership, was in 1922, which consisted of interchange of correspondence which culminated in nothing. It related to the selling of the Cutler assets. It died a quick death and was not revived for a number of years. The next contact in that negotiation was in February, 1927, which was verbal. That likewise was dropped. I do not recall the time or manner of various contacts with representatives of the John Bean Manufacturing Co. There were various of them, mostly verbal, one by long distance telephone, during 1927 or 1928. Prior to [179] September 16th, 1929, an arrangement was had in writing for the selling of the assets of the Cutler Manufacturing Company, partnership, to the John Bean Manufacturing Company, which was

(Testimony of F. W. Cutler.)

dropped. This document was ordered produced by the Master. It is an agreement dated July 23, 1929, whereby Frank W. Cutler and Asa B. Cutler agree to transfer to John Bean Manufacturing Company "all right, title and interest in all assets standing on the books of Cutler Manufacturing Company as of December 31, 1928", subject to conditions therein stated relating to an audit to be made as of October 31, 1929.

On or about November 29th, 1929, a corporation, known as the Cutler Manufacturing Company, Inc., was incorporated, with Asa B. Cutler as president, Frank W. Cutler as vice president, Paul Van Wyk as secretary, and I. R. Acheson as treasurer, and the Cutler Manufacturing Company, copartnership, sold their assets to this corporation in exchange for capital stock thereof. This was not done on November 29th, 1929, but February 14th, 1930. The charter was applied for some months in advance of that but was not put into effect but the same corporation was used and assets of the copartnership transferred to it on February 14, 1930. I authorized James G. Wilson to write the letter to W. C. Bristol, dated June 30th, 1930, which was received in evidence as plaintiff's Exhibit 11 over the objection of defendant. This objection was on the ground that said letter related to an offer of compromise and was without prejudice. The letter referred to was written by James G. Wilson to W. C. Bristol, "Attorney for Floyd J. Cook," and reads as follows:

(Testimony of F. W. Cutler.)

"Referring to your letter of April 29th, and subsequent telephone conversation with you in regard to the offer made by you on behalf of Mr. Cook in connection with the contract between Mr. Cook and Mr. Asa B. Cutler and Mr. F. W. Cutler of May 4, 1928, as I advised you at the time the offer would not be acceptable but stated I would sub- [180] mit the same, I am now authorized to say that the Cutlers will not consider the offer you made. This of course is without prejudice to the rights of the Cutlers or the Cutler Manufacturing Co. Inc.

"I am further authorized to advise you that the Cutler Manufacturing Co. Inc., has transferred its business to the Food Machinery Corporation. Mr. Cook was notified of the transfer of the business from the Cutler Manufacturing Co., a co-partnership, to the Cutler Manufacturing Co., Inc., but to date has exercised no option accorded him under the contract.

"Mr. Asa B. Cutler and Mr. F. W. Cutler consider that they have no further interest in the contract except to finish up the material on hand as provided for in said contract, and they will send Mr. Cook a statement of royalties due him with check to cover within a few days.

"I am writing this as attorney for Mr. Asa B. Cutler and F. W. Cutler and the Cutler Manufacturing Co., Inc. I am sending a copy of this letter to Mr. Floyd J. Cook, Corbett Building, Portland, Ore."

(Testimony of F. W. Cutler.)

Thereupon letter of April 5th, 1930, from Cutler Manufacturing Co., Inc., by A. B. Cutler, to Floyd J. Cook, was marked for identification plaintiff's Exhibit 12. This exhibit was subsequently received in evidence.

I do not know whether this was the first notice in writing given the plaintiff of the transfer of the assets from the Cook partnership to the Cutler corporation.

The Cutler corporation was dissolved in April, 1931. At that time the Cutler Manufacturing Co. had previously sold its assets to the Food Machinery Corporation and had no plant. As I recall, the date of transfer to Food Machinery Corporation was on or about March 29th, 1930. The actual transfer was not made by the instrument of March, 1930, but was accomplished by another instrument later. The machines and plant and parts that were in manufacture, with certain exceptions, were transferred from the Cutler Manufacturing Co. Inc., to the Food Machinery Corporation, which, with the exceptions noted, transferred the former business [181] of F. W. Cutler and Asa B. Cutler, as partners, to the Food Machinery Corporation. There were some assets within the physical confines of the plant which were not the property of the Cutler Manufacturing Co. Inc. and therefore not included in the sale of the corporation to the Food Machinery Corporation. Thereupon there was offered and received in evidence contract of March 29th, 1930, and marked plaintiff's Exhibit 13. The contract, dated March

(Testimony of F. W. Cutler.)

29, 1930, is between Cutler Manufacturing Co. Inc., and Food Machinery Corporation. Thereby the Cutler Company, the first party, agreed to sell

> " * * * the business of said first party, including all its assets, equipment, machinery, patterns, patents, and applications for patents, pertaining to said business, as will be shown by an audit to be made * * * as of March 31st, 1930, to which audit reference is hereby made, and which audit is made a part of this agreement by reference, together with the good will of the business of said corporation, and the right of using the name of Cutler Manufacturing Co., and any other property belonging to said corporation, of whatsoever kind, character or description, wheresoever situated, not referred to in said audit. Said party of the second part hereby agreeing to assume all liabilities shown by said audit."

As consideration therefor Food Corporation therein agreed to issue certain shares of its common stock, subject to approval by California authorities of the issuance of the stock.

There was received in evidence copy of the bill of sale from Cutler Manufacturing Co., Inc., to Food Machinery Corporation marked plaintiff's Exhibit 14. The bill of sale executed by Cutler Manufacturing Co., Inc., dated June 25, 1930, recited that

> " * * * in compliance with the contract made and entered into on the 29th day of March, 1930,

(Testimony of F. W. Cutler.)

by and between the Cutler Manufacturing Co., Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, the undersigned, Cutler Manufacturing Co., Inc., does hereby sell, assign, transfer and set over unto Food Machinery Corporation, the business of the Cutler Manufacturing Co., Inc., including all of its assets, equipment, machinery, patterns, patents and applications for patents, pertaining to said business, as shown by the audit made by Peat, Marwick, Mitchell & Co., accountants and auditors, as of March 31, 1930, * * * together with the good will of the business of said corporation, and the right of using the name of Cutler Manufacturing Co., and any other properties belonging to said corporation of whatsoever kind, character or description, and wheresoever situated, not referred to [182] in said audit, saving and excepting therefrom, however, and which is not hereby transferred, the interest of the Cutler Manufacturing Co., a co-partnership, and/or Cutler Manufacturing Co., Inc., a corporation, in and to that certain contract made and entered into the 4th day of May, 1928, by and between Asa B. Cutler and F. W. Cutler, partners doing business as Cutler Manufacturing Co., of Portland, Oregon, and Floyd J. Cook, of Medford, Oregon, with reference to the manufacture and sale of fruit grading and sorting machine known as the 'Cook Grader.' "

(Testimony of F. W. Cutler.)

I had nothing to do with the Food Machinery Corporation acquiring on February 27th, 1929, the right to manufacture the Clear fruit grader and do not know who did. I knew that the John Bean Manufacturing Co. were manufacturing and selling a machine in competition with the Cutler Manufacturing Co. partnership, which machine was called the Clear machine. I assumed, of course, they must have had an arrangement for that purpose. I do not know when the John Bean Manufacturing Co. acquired the right. I derived information for the answer which I verified on behalf of the Food Machinery Corporation from the office of the Food Machinery Corporation in San Jose. I have not the contract of February 27th in my possession but can secure the same. Thereupon a copy of the Clear contract of February 27th, 1929, was offered and received in evidence as plaintiff's Exhibit 15. The Clear contract of February 27, 1929, was between Charles J. Clear, first party, and John Bean Manufacturing Company, second party. Thereby first party granted second party an exclusive license to use patent No. 1427264 for a five year term to December 31, 1934, on a royalty basis, with minimum royalty of $1500 per year. Second party had the right to cancel on 90 days' notice at the end of any year of the original or extended term. Second party had the right to extend the license for the life of the patent. Second party agreed not to assign the license or grant a sub-license without the written consent of first party. [183]

(Testimony of F. W. Cutler.)

A. B. and F. W. Cutler personally ceased to manufacture the improved Cook grader on transfer of the assets of the partnership to the corporation but caused the parts remaining on hand to be manufactured for them subsequently to that date, first by the Cutler Manufacturing Co. Inc., and secondly, by the Food Machinery Corporation. I cannot say how many were so manufactured. Mr. Van Wyk can tell. On February 14th, 1930, the partnership ceased operation because it sold its plant and equipment with which to manufacture. Remaining on hand at that time were certain parts of Cook graders which the contract with Cook gave us the right to manufacture and clean up the stock to the extent of 10 machines after discontinuance of our contract with him. Based on that provision and that right we caused to have those extra parts manufactured for us and they were sold to clean out that stock. The Food Machinery Corporation sold them for us as our agent. The consideration paid by the Food Machinery Corporation to the Cutler Manufacturing Co., Inc., for the assets of that company purchased by the Food Machinery Corporation was stock of the Food Machinery Corporation issued to the Cutler Manufacturing Co. Inc., which was later distributed to the stockholders of the Cutler Manufacturing Co. Inc., on its dissolution.

On Cross-examination

the witness stated that there were 4 machines manufactured after the sale from the Cutler partnership

(Testimony of F. W. Cutler.)

to the Cutler Manufacturing Co. Inc., shipping dates of which were February 28th, May 24th, August 13th and September 10th, 1930.

With reference to notice of transfer from Cutler Manufacturing Co., partnership, to Cutler Manufacturing Co. Inc. Prior to April 5th, 1930, Mr. Cook came over to our office, 404 [184] East Mill, I think around September 1st, 1929, or thereabouts, a few weeks one way or the other, and stated that he had heard we were going to sell our business. I advised him that negotiations were pending at that time whereby the Cutler Manufacturing Co., partnership, might dispose of its assets. Mr. Cook wanted to know where he stood in the matter with reference to his contract with the partnership, and I advised him that the contemplated purchaser might or might not choose to go on with the—to manufacture Cook graders, providing Mr. Cook was agreeable to such a course. And I also recall advising him at that time that I had received the impression from the contemplated purchaser of our business that they probably would not choose to manufacture another divergent grader, such as his, because of the fact that they already had an arrangement with a competitor to manufacture a machine of that general type. Mr. Cook stated that he could require a purchaser to manufacture the Cook grader, and I advised him at that time that in the event we sold our business to a third party that we had the right under our contract to consider that the contract between Cook and ourselves was cancelled. Therefore, at that time it was

(Testimony of F. W. Cutler.)

clearly brought forth, directly to Mr. Cook, that we contemplated a sale of our business. Mr. Cook very emphatically stated that he would not acquiesce whatsoever to the transfer of the rights under his contract with us, with the partnership, to a third party if that party were to manufacture a competing grader.

With reference to notification of transfer of assets prior to plaintiff's Exhibit 12—April 5th, 1930. At the time of the conversation I speak of directly with Mr. Cook, while the transfer was not an accomplished fact at that time, the notification was of the fact that a transfer and sale of the assets [185] of the partnership to the Cutler Manufacturing Co. Inc. was clearly and specifically given to Mr. Bristol, attorney for Mr. Cook, during the course of several hours conversation with Mr. Bristol and myself in Mr. Bristol's office, Portland, on or about March 17th, as I recall it, or some time in March. In the course of that several hours conversation with Mr. Bristol it was repeatedly brought out that the Cutler Manufacturing Co., partnership, had sold its assets to the Cutler Manufacturing Co. Inc., not including its rights under the contract of May 4th, 1928.

Before the date of the March 29th, 1930, contract there was a discussion between ourselves and the representatives of the Food Machinery Corporation as to whether or not the Cutler Manufacturing Co. Inc., assets included the Cook contract. This was had with Mr. Paul Davies, vice president and treasurer of the Food Machinery Corporation, who was

(Testimony of F. W. Cutler.)

conducting negotiations on behalf of the Food Machinery Corporation. I specifically stated to Mr. Davies that the Cook contract made between Floyd Cook and F. W. and A. B. Cutler was not included in the assets of the Cutler Manufacturing Co. Inc., which I believed to be true. (The foregoing testimony with reference to conversation with Davies prior to the execution of the March 29th, 1930, contract was taken under the equity rule over the ruling of the Master and over the objection of attorney for plaintiff).

Prior to the consummation of the transaction, that is, the passing of the bill of sale, and after the contract of March 29th, 1930, Mr. Davies raised the point as to whether the assurance I had given him was sufficient to safeguard the Food Machinery Corporation with respect to passing of this contract and he desired to have specifically incorporated in the bill of sale an exception to that effect, which I saw no objection to, and it was incorporated. [186]

Following the notice given by me to Cook and his attorney of the transfer of the partnership to the Cutler Manufacturing Co. Inc., and up until July 26th, 1930, we received no notice from Mr. Cook of his election to exercise any option he had, or claimed to have, under the Cook contract with respect to requiring the purchaser to take over the obligations of the contract, or an option to cancel, or any other option.

(Testimony of F. W. Cutler.)

F. W. CUTLER,

on behalf of defendants, testified:

Prior to May 4, 1928, the Cutlers had no contractual relations with any of the defendants named or any of the corporations who have been named as having joined in some form or other the Food Machinery Corporation. We had some discussions with some of the executives of the John Bean Manufacturing Company or the John Bean Spray Pump Company looking forward to some merger or sale. We had been approached by them on the subject at various times. We had offered no encouragement to the executives of the Bean Spray Pump Company or the John Bean Manufacturing Company prior to May 4, 1928. There were no pending discussions with reference to sale or merger at the time of the May 4, 1928 contract. I had seen Mr. Crummey in 1929 at Salt Lake and each time where we were approached with the idea that we might join with them the decision had been emphatically negative. After the May 4th contract Mr. Crummey of the John Bean Manufacturing Company did at times approach me particularly sometimes by visit as he came through Portland, later in 1929 he called me by telephone. Prior to July 23, 1929, the date of the first contract, the John Bean Manufacturing Company made approaches. In May, 1929, as evidenced by Exhibit 2, approach was made and we declined to consider any combination or sale. Mr. Crummey called upon us in Portland on March 18, 1929. The discussion at that time was largely a pre- [187]

(Testimony of F. W. Cutler.)

sentation on the part of Mr. Crummey of the advantages that would accrue to us by selling our company to them, some deal of that kind. Our response to that was very much negative. There may have been contacts between that and the first day of May but I have no recollection of them. On May 28, 1929, either my brother or I received a longhand letter from Mr. Crummey addressed to "My Dear Mr. Cutler"; said letter is defendants' Exhibit 6. My reply to that letter was dated June 21, 1929, and is defendants' Exhibit 7. My letter of June 21st seemed to foreclose all possibility of a deal between Cutler Manufacturing Company and the John Bean Manufacturing Company. It was brought back to life again by Mr. Crummey's persistence. Mr. Crummey on July 15, 1929 wrote me a letter taking up the question again. He saw us in Portland after June 21st and on July 15th sent us an air-mail of that date suggesting their Chief Engineer, Mr. Thompson, was up in this country on a vacation, was going to be here the first of the following weeks, that he would like to have Mr. Thompson meet us and at the same time Mr. Crummey and Mr. Davies would be glad to come up and wanted us to take dinner with them here in Portland. On the week prior to July 15th Mr. Crummey came into our office in the afternoon and made an appointment to meet him again in the evening. My brother and I had dinner on the East side, we wanted to talk this matter over, Mr. Crummey went somewhere else and we agreed to meet him back there at the office at six thirty, at

(Testimony of F. W. Cutler.)

that time I became rather inclined to have some kind of a deal if the consideration was satisfactory, my brother A. B. was very much opposed to it.

In November, 1929 we got a charter for the corporation Cutler Manufacturing Company, Inc., and organized that corporation in the middle of February, 1930. The principal reason for the incorporation was in view of the fact that we had four partners [188] in our business; when we came into 1929 we had an agreement with Mr. Atcheson, whom we were just taking into our employment, and Mr. Van Wyk, who had been with us for a number of years, whereby we agreed that they should have five per cent of the net profits of each year's business not to be drawn down in cash but to be set up as capital in the capital accounts of the company at the end of each fiscal year; in November, 1929 it occurred to us we had a two-party partnership trust agreement when we now had four partners in the business; that complicated it a good deal and was the main consideration for incorporating at that time; I expected and anticipated a sale to the Food Machinery Corporation and was getting into hot water disagreement and it was quite doubtful in our minds whether we would go on with it or whether the other parties would want us to go on with it; we were getting at loggers heads. So we applied for a charter before we got too far. There was also a second possible angle in connection with the Federal Income tax matters; those reasons were sufficient to warrant incorporation; on February 14th we sub-

(Testimony of F. W. Cutler.)

scribed for the stock and organized the corporation and transferred the assets of the partnership to the corporation; the stock was distributed among the four partners in the ratio as agreed upon; on March 29, 1930, no corporate action had been taken authorizing the contract of that date nor was there any corporate action on the subject of any deal with the Food Machinery Corporation.

Corporate action of the Cutler Manufacturing Company was taken at its stockholders and directors meeting on June 25, 1930. The minutes of the directors meeting of that date were received in evidence as defendants' Exhibit 8. The stockholders meeting of Cutler Manufacturing Company, Inc., held the same date was received in evidence as defendants' Exhibit 9. [189]

A catalogue was issued under the name "Cutler Manufacturing Company, Division of Food Machinery Corporation" prior to the time that the sale had been agreed to and approved by Food Machinery Corporation, because we were so confident in September, 1929, that this arrangement was going to go through, that we made a public announcement of it.

Although Food Machinery Corporation did not take over the Cook patent, it advertised the Cook Grader, under its own name in 1930, under the arrangement for manufacture and sale of parts on hand, made with A. B. Cutler and myself.

(Testimony of Paul L. Davies.)

NEGOTIATIONS BETWEEN CUTLERS AND FOOD MACHINERY CORPORATION

PAUL L. DAVIES,

a witness for defendants, testified:

I reside at San Jose, California, am vice president and treasurer of the Food Machinery Corporation, and have been since October, 1928. At that time that corporation was known as the John Bean Manufacturing Company. It is the same company with change of name. I was a director of the old Bean Spray Pump Company which was the antecedent of the John Bean Manufacturing Company. The John Bean Manufacturing Company was organized in 1928 but I had been a director of the Bean Spray Pump Company for approximately three years prior to that time. I was familiar with negotiations which took place between the Food Machinery Corporation and Frank W. and Asa B. Cutler. I took active charge of those negotiations on behalf of the Food Machinery Corporation on July 22, 1929. There had been approaches on both sides prior to that time, mostly on the part of the John Bean Manufacturing Company to see if the Cutlers would be interested in selling out their business. The Cutlers up to that time had stated they would not be interested. I was there in Portland on July 22, [190] 1929. I came here for the purpose of negotiating a deal with the Cutlers. Plaintiff's Exhibit 23 was a memorandum of July 23, 1929 and attempt to work out the details of sale. It was the crux of the

(Testimony of Paul L. Davies.)

whole agreement. We were shown a balance sheet of the Cutlers of October 31, 1928. We had no other available. The Cutlers had certain ideas of what the profits were going to be for 1929 and the whole deal was left for final settlement until the audit which was called for in that contract which was to be as of the end of the fiscal year October 31, 1929. In the working out of the details there were lots of discussions back and forth as there always is in such details but it was all on a good friendly basis. When we drew the memorandum of July 23, 1929 we had about an hour to catch the train and we sat down and arrived at a general memorandum contract of what our ideas on the subject were. This contract was never carried out. Following the execution of this contract on our return to San Jose we learned of the contract between F. W. Cutler and Asa B. Cutler on the one hand and Floyd J. Cook on the other, relating to the exclusive license to the Cutlers to manufacture the Cook graders. I cannot fix the time of this information. Under the agreement of July 23rd things went along in statu quo. My best recollection is that we didn't go into any details about the closing of the deal until sometime in September when the close of the fiscal year was coming up when the Cutlers knew about how much business they were going to have for the year and we began discussing the closing of the deal. The first time we seriously considered the Cook-Cutler contract was in September. It might

(Testimony of Paul L. Davies.)

have been discussed once or twice prior to that time when Mr. Cutler came to San Jose and it might have come up in general discussion but I never began to give it any thought until that time. When it came [191] up for consideration first of all we had a contract with Charles J. Clear. That contract contained a minimum royalty clause. We had spent in the neighborhood of $15,000 in making that machine a commercial success. I asked our engineers to make a report on what they felt was the best machine as between the Clear and the Cook Grader. They reported they thought the Clear machine was a much better machine. When the Cook contract came to my attention there was a clause in the contract that if we had taken over the contract we couldn't handle any competing machine which would have meant we would have had to get rid of the Clear machine. I told Frank Cutler that it would be impossible for us to give up the Clear machine and take over the Cook contract. I also told him there was a possibility that if Mr. Cook was willing to waive the provision calling for the exclusive handling by the Food Machinery Corporation that the Cutler division could continue to handle the Cook and the Bean division could handle the Clear. Subsequent to that time Mr. Cutler told me that he had talked to Mr. Cook and Mr. Cook had definitely advised him that the provisions of the contract had to be enforced. Thereupon I told Mr. Cutler definitely that we would not take

(Testimony of Paul L. Davies.)

over the Cook contract. To my best recollection that was in the latter part of October, 1929 when he and Mr. Asa B. Cutler attended the Board meeting in San Jose. Frank Cutler was elected a director of the Food Machinery Corporation at that meeting in October, 1929. He did not own any stock in the corporation at that time. We got right down to business when we finally got the audit revealing the results of the operations and the balance sheet of the Cutler Manufacturing Company as of October 31, 1929. This was in the latter part of December, 1929, or the first of January, 1930. Neither the directors or stockholders of Food Machinery Corporation had up to that time taken any official action on the memorandum contract of July 23, [192] 1929 nor on any revised contract. On March 29, 1930, a second contract, Exhibit 13, was signed. This was signed by the Food Machinery Corporation in the early part of April, 1930, subject to the approval of the Board of Directors. This came before the Board at its meeting on April 28th at which I was present. The Board of Directors approved the contract. The question of the Cook grader came into discussion at the April meeting. In all of our discussions subsequent to Mr. Cutler's talking the matter over with Mr. Cook it had been definitely understood that Food Machinery Corporation would not take over the Cook contract. In the discussion before the Board of Directors it was pointed out that we would not assume the Cook contract, in

(Testimony of Paul L. Davies.)

other words, that was not an asset that would be taken over. This was at the meeting of April 28, 1930. I also told the Directors at that time that in the final bill of sale transferring the assets that that would be definitely excluded. This information was given to the Board prior to the approval of the contract dated March 29, 1930. I think the audit was available at the April 28th Board meeting but I am not sure. Following that meeting around the middle of June, I couldn't say exactly, we received the bill of sale. Plaintiff's Exhibit 14 is a copy of that bill of sale. The Commissioner of Corporations of the State of California gave his consent and permission to such sale and transfer. The stock was turned over to the Cutlers subsequent to May 15th. All papers, including the stock of the Food Machinery Corporation, was sent to James G. Wilson for delivery upon the transfer of the bill of sale and deeds to the property.

On Cross-Examination

the witness testified: I never had any transactions direct with Mr. Cook. All negotiations were carried on with Mr. Cook through Mr. Cutler and I have no in [193] formation as to the information given to Mr. Cook except through Mr. Cutler reporting details of the conversation to me. He reported this when he came down to the Board meeting in October, 1929. So far as I know all of the other assets of the Cutler Manufacturing Company aside from

(Testimony of Paul L. Davies.)

the Cook contract were taken over by the Food Machinery Corporation, including general good will, bills receivable, and everything of that kind, both physical and raw materials on hand and everything of that sort. We took over the assets of the business as called for in the contract as subsequently ratified.

On Re-direct Examination

the witness testified: We took everything as outlined in the bill of sale. We did not take over the Cook contract.

PAUL VAN WYK,

a witness for defendant, identified as a true account between the Cutler Manufacturing Company, copartnership, and Cutler Manufacturing Co. Inc., a corporation, with Floyd J. Cook Defendant's Exhibit 3, which was received in evidence and substituted for Exhibit 2 attached to the answer. A third check was made of all of the invoice copies in our files to make sure that every item pertaining to Cook Graders would be included in the statement. This check was made both by one of our clerks and myself on separate occasions and then the lists compared to make sure that they agreed. The information as to royalties was derived from the original invoices and the amounts due Mr. Cook as commissions in the same manner. It is our practice

(Testimony of Paul Van Wyk.)
when entering invoices in our sales journal to credit the commission at that time, at the time of the sale or at the time of the entry, to the agent's account. This was done in this case besides which we went through the invoice file to see that none were omitted. [194]

The statement of evidence set forth in the following pages numbered 193 to 226, inclusive, was prepared by attorneys for plaintiff. [195]

In the fruit industry the words "fruit sizer" and "fruit grader" are used generally as synonymous terms. The function of a fruit grading machine is to sort fruit according to sizes to facilitate the work of the packer in placing only fruit of the same size in the particular container. (Plaintiff's witness Reter; Defendant F. W. Cutler).

Prior to 1925 there was no general use of machines for sizing of pears. (Plaintiff's witness Reter). The pear, particularly of some varieties, is delicate and bruises easily, even when green. (Plaintiff Cook). Growers in the Medford district in Oregon were prejudiced against machines then available because their use bruised the fruit. (Cook). Prior to 1925 defendants F. W. Cutler and A. B. Cutler sold a so-called weight machine, used principally for apples. There was likewise a machine known as the "Ideal", and another firm marketed a divergent rope type sizing machine, but there was

no sizing machine used generally for pears in the Medford district (Reter; Plaintiff's witness Kyle; Plaintiff's witness Edmiston; Cook), and the machines which were available were not satisfactory for pears. (Reter; Kyle).

The Cook Grader, as originally conceived and constructed by plaintiff, is described in plaintiff's patent and was described by witness. It has two parallel horizontal slots or troughs. Between the two troughs is a canvas belt, and outside of each and parallel to the troughs are canvas belts. The function of each trough is the same and a description of one is sufficient. Attached to the two belts on each side of the trough are flexible canvas aprons which extend into the trough to the opening in the bottom. The troughs are open at the bottom, leaving a space through which the fruit drops in the sizing operation. One side [196] of the trough is fixed. The other side is movable and is divided into segments. Each segment may be moved, by screws, horizontally in a direction perpendicular to the axis of the trough. By means of the movable segments the width of the aperture at the bottom of the trough may be varied. Thus, the aperture near the feeding end of the machine may be adjusted at, say, two inches. The aperture opposite the next segment may be increased to 2 1/16 inches, and succeeding segments may be adjusted to increase the aperture progressively. Fruit to be graded is placed on the aprons in the trough at the feeding end. It is carried along the trough until it reaches a point where

the width of the aperture equals or exceeds the diameter of the fruit. At that point the fruit drops into a bin beneath. By that means, in the example given, the first bin will receive fruit of a diameter up to two inches; the next bin will receive fruit varying from 2 to 2-1/16 inches; the next from 2-1/16 to 2-1/8 inches, and so on. By that means the fruit is sorted by sizes and the packer working at a particular bin has available fruit practically uniform in size to wrap and place in the shipping container. (Reter; Plaintiff's witness J. Cook; Plaintiff Cook).

Plaintiff conducted his business at Medford, Oregon, under the name Cook Manufacturing Company, of which he was the sole owner. (Cook).

In 1925 plaintiff constructed and sold his first four machines; and these machines were sold and used in packing houses in Medford for handling pears. (Kyle; J. Cook; Edmiston; Cook). The 1925 machines contained some faults in construction details. The 1926 season was devoted to further experimentation and study, and not more than one machine was built. (J. Cook; [197] Cook). In the 1927 season plaintiff constructed and sold eleven machines. (J. Cook; Cook). In the spring of 1928, prior to the contract of May 4, 1928, hereinafter referred to, plaintiff ordered parts and prepared for construction of 25 machines. (J. Cook; Cook). Negotiations for sales of some of the 25 were in progress when plaintiff made his royalty contract of May 4, and turned his business over to defendants

F. W. Cutler and Asa B. Cutler. (Cook). Up to that time plaintiff's sales had been to packers in the Medford district, but plaintiff was then negotiating for sales, which were later made by defendants, to a California packer, and had inquiries about his machine from Colorado and Washington. (Cook).

Plaintiff's machine was adaptable for other fruits including apricots, peaches and cantaloupe (Cook), and one witness tells of its use for grading peaches, on which it was working "very satisfactorily." (Reter).

At the end of the 1928 season, after sales by defendants, the Medford market was fairly well supplied, but there was still a possibility of sales in that district, and plaintiff, but for his contract with defendants, had intended to "branch out, come to Portland" and establish his own plant. (Cook).

Plaintiff's banker, during the period prior to May 4, 1928, testified that he consulted with plaintiff constantly, that orders as received were discussed, that the witness was satisfied that the orders could be filled at a profit to plaintiff, and on the basis of his information he had extended credit to plaintiff. Based on his information he concluded that plaintiff was then "conducting a successful business." (Harder).

Plaintiff applied for a patent on his device which was granted on October 25, 1927, No. 1646951. (Cook). After plaintiff [198] and defendants, the Cutler partnership, made the contract of May 4, 1928, defendants suggested that the claims of the Cook

patent were too narrow and did not give adequate protection. At their suggestion plaintiff applied for a reissue of the patent, which was granted on December 4, 1928, under Reissue No. 17149. (F. W. Cutler).

One Davidson claimed to be the owner of a Palmer patent and claimed that the Cook Grader infringed his patent. On October 7, 1929, the Cutler partnership took an assignment from Davidson of the Palmer patent to protect the Cook patent. (F. W. Cutler; Defendant A. B. Cutler).

Plaintiff recounted a conversation with F. W. Cutler, during the negotiations leading up to the May 4, 1928, contract, as follows:

> "Mr. Cutler asked me if I wanted to sell my patent, and I said that I didn't think that I did. He stated to me, as near as I can recall it—Mr. F. W. Cutler, I believe—that he wished to fill out his line and take on a grader in the nature of mine, and that he had looked into my patent and found the claims were very limited. He stated that they could use the Palmer patent and make one similar to mine to compete with it, but that they would rather have mine inasmuch as it had been on the market and advertised and had a reputation. Whereupon I said that I might consider a royalty contract, and we started in to discussing matters of that kind."

There is evidence to the effect that the Cook design had certain desirable features, not present in

other types of graders. One type of machine is known as the divergent type. The fundamentals of that type include two horizontal ropes on which the fruit is carried. The ropes are placed so that they diverge slightly, being relatively close together at the end where the fruit is received and farther apart at the far end. [199] Consequently, there is a constantly increasing space between the ropes. As the fruit is carried along it drops between the ropes when it reaches a point where the space between the ropes exceeds the diameter of the fruit. (Reter; Edmiston; Cook).

Witness Reter compared the Cook machine with those of other types in the following language:

> "Now with the ordinary divergent type or other types of machines, or the weight machine, for that matter, that had existed up to that time, necessarily the bins that were arranged for those three preponderant sizes would be overflowing, while the other bins would not have anywhere near their capacity, and with the Cook machine, by carefully calipering your diameters you could so graduate that as to spread them more thoroughly and get more capacity out of the machine than any other machine that I have ever had any contact with, and that was caused by being able to adjust these individual slides to a very fine point."
>
> "Well, with the Cook machine you get an absolutely positive size to each bin, and with the distributor you don't get a positive size to

each bin—you are not apt to. You can if it is carefully worked; it may be that you will get it; but the possibilities are that you won't."

Another witness testified to similar effect. (J. Cook). And a further witness used this language:

"The advantage of the Cook machine over that (divergent rope type) is that you can see that a divergent rope got gradually wider at all times. These ropes started out narrow at the end where the fruit was taken on and got gradually wider. Now in the Cook machine you could regulate each bin you could drop for; that is, you could regulate each bin, whereas you could not in the rope grader." (Edmiston).

By adjustment of the Cook machine it could be made into a divergent type. (Reter).

Plaintiff compared the two types as follows:

"The Original Cook Grader with the sizing bars adjusted laterally under the apron permitted [200] of a definite size in each bin, if so required. Any diverging principle does not permit of an immediate change in size from one bin to another. You cannot spring a piece of metal or wood sufficiently quick enough to immediately get your size from one bin to the other. That was the basis and the principle on which I received my patent. I could accomplish the same result as on the Clear machine (hereinafter referred to, a machine manufactured by defendant Food Machinery Corpora-

tion), or on any other machine, and, in addition, I could break my sizes immediately between one bin and another, whether it was a quarter of an inch or an inch; I could jump from two inches to three inches in the next bin, practically."

Plaintiff made no substantial changes in the design of the grader, as originally conceived and manufactured by him from 1925 to 1928, and defendants, the Cutler partners, continued to manufacture that so-called Original Cook Grader throughout the 1928 season. Defendants made the Original Cook Grader until October 1, 1928. (F. W. Cutler).

Plaintiff's witness Reter stated that the machine had never given trouble in his plant and that he considers it "a very efficient machine". He first saw the Cook machine operating in July, 1927. He stated, "I ordered two of them and they were satisfactory, and the following year I wanted two more."

Plaintiff's witness Kyle testified that his company purchased two machines in 1925, that in 1928 he sold those two and bought three new Original Cooks, that the two first purchased were used continuously for three reasons, and that in 1929 he tried to get another Original Cook, but because it was not then being made, he purchased a Clear machine. Based on his use of the Original Cook he stated:

"We have been satisfied with the results that we have gotten from the Cook. In fact, we are pleased." [201]

Plaintiff's witness J. Cook, who assisted in the manufacture of the Original Cooks and who continued on as an employee of the defendants, the Cutler partnership, to service machines, commented on the operation of the machine as follows:

> "Well, most of them the trouble was that people would not take care of their slides, would not set them right, adjust them to the size fruits, one thing and another like that . . . they was likely to get their guides out of line, the slides out of line and get them closer in so as to crowd the fruit out of place . . . and that would cause them to pinch the fruit lots of times. . . . There wasn't a thing wrong with it (the machine). It done good, accurate work if it was set accurate."

Plaintiff's witness Edmiston, whose company purchased plaintiff's first machine, stated that "the Original Cook will do very excellent work when it is properly operated" and that it worked "as satisfactorily as it was claimed it would". He added,

> "* * * I would say those machines never were satisfactory, because they were too expensive to operate, in my judgment."

One criticism made of the Original Cook was that it made it possible for persons packing from bins to "hog" fruit. The packers are paid on a piece work basis, and it is to their advantage to get as much fruit as possible in the bin at which they work. By a change in the adjustment of their individual

slide to widen the slot more fruit is deposited in that bin. This improper adjustment of one segment may cause jamming of fruit at the beginning of the next segment. (Reter; J. Cook; Edmiston). The Master asked plaintiff's witness Edmiston if the use of an adjusting screw, operable only with a master key, would not obviate the defect, and the witness stated that it [202] would.

Prior to 1927 fruit washers were not generally used, but in that season they came into general use in the Medford district. (F. W. Cutler; Cook).

In the washer the fruit is dipped in an acid solution, then passed through rinsing water, and then passed through a drier. The rinsing does not remove all trees of acid, and the drier does not remove all moisture. The result is that fruit passing from the washer to the grader carries over moisture containing some acid. (Reter; Edmiston; F. W. Cutler).

With the Original Cook Grader the fruit would gradually get the aprons wet. This had two effects. The acid solution tended to rot the aprons (J. Cook; Edmiston; F. W. Cutler), and the wetting of the aprons only, without wetting the canvas belts, caused the aprons to shrink and become a different length from that of the belts to which they were attached. This in turn caused some trouble because the belts tended to run untrue and tended to come off the pulleys. (F. W. Cutler; Edmiston; Cook).

Plaintiff's witness Reter stated that he avoided this problem by the use of acid resistant oil on the canvases, and had no operating difficulties because

of the use of washers. "Canvases had to be renewed about once every two years." Plaintiff's witness Edmiston likewise used oil, but, as he stated,

> "It didn't entirely solve the problem; it went a long way; * * * It probably reduced our cost of replacing belts, * * * oh, a great deal more than half."

Plaintiff's witness Reter stated, [203]

> "Well, there has been an occasional time when the belt has run a little sideways, or slipped, * * * in two seasons' operations we haven't had one five minutes shutdown of any kind."

Plaintiff's witness Edmiston stated that the wooden guides, when made with soft wood, alternately wet and dry, sometimes splintered and caught and tore the canvases; but no such trouble was encountered from guides made of hardwood. Plaintiff testified,

> "Occasionally somebody would jimmy one of the slides up and rip one of those aprons off, . . ."

Defendant F. W. Cutler stated that the canvases were "flimsy" and were frequently ripped, and tended to run off the pulleys.

Defendants F. W. Cutler and A. B. Cutler operated under the name of Cutler Manufacturing Company, a copartnership. In November, 1929, Cutler Manufacturing Company, Inc., was incorporated. In February, 1930, the partners transferred the business to the newly formed corporation. (F. W. Cutler).

The partnership and its successor did a general business of manufacture and sale of fruit handling machinery. Their products included a wide variety of machinery other than Cook Graders. As stated by plaintiff, the Cutlers, in general conversations with him, stated that they, the Cutlers, "were dominating things in the fruit machinery production in this territory". Likewise, plaintiff refers to "the ability and the fine organization, far flung sales organization" of the Cutlers.

In May, 1929, a Mr. Crummey, of John Bean Manufacturing Company, in a letter urging a merger of the Bean and Cutler [204] interests, refers to the "wide experience" of the Cutlers in the fruit machinery business.

The Cutler catalogue, issued in 1929, on the title page recites:

> "17 years continuous experience in the manufacture of fruit equipment."

Following those words is a map with lines pointing to Russia, Australia, Tasmania, New Zealand, England, Holland, Switzerland and South Africa. Then follows the statement:

> "The sun never sets on Cutler Graders."

In June, 1928, defendant partners published 1000 copies of a pamphlet advertising the Original Cook Grader, which were distributed to agents and prospective customers "where we thought the Cook could be sold". (A. B. Cutler).

The Improved Cook was shown in the defendants' 1929 catalogue along with other lines of machinery then being made, and likewise in the 1930 catalogue issued by "Cutler Manufacturing Company—Division Food Machinery Corporation".

With respect to their efforts to sell Cook Graders, defendant F. W. Cutler said:

> "There was no favoritism shown as between our own equipment and the Cook. We pressed sales of Cook machines just as hard as we pressed our own. We advertised them to the same extent. We had just as much at stake."

Fruit machinery business is seasonal. Manufacturers have to prepare for sales prior to the actual fruit season. Parts have to be acquired in advance. Cook machines were handled that way, "the same way we did the rest of our equipment". The fruit [205] machinery sales occur largely in "June, July and August; mainly in July and August". Materials for machines must be acquired, in most instances, in advance of orders for the machines.

Between May 4, 1928, and May 27, 1929, defendant partners expended $5,639.71 for the single item of labor, in their efforts to develop and improve the Cook Grader and put it on the market. Adding 60%, a conservative estimate, for factory overhead, the cost would amount to $9,023.54. In addition, there was a cost of material for which no record was kept. Likewise, there was expense for service men in the field servicing Cook Graders. (F. W. Cutler).

At the end of the 1928 season, in October of that year, the Cutler partnership ceased to manufacture and distribute the Original Cook Grader and began the experimental work which resulted in a grader of altered design which came to be known as the Improved Cook Grader. (A. B. Cutler; F. W. Cutler).

Late that year their California agent suggested to them that there was a profitable field in the citrus fruit industry for sizing of lemons. Up to that time no machine had been used successfully for sizing lemons. (F. W. Cutler).

Defendant F. W. Cutler stated that the two reasons for the change in design were, first, to adapt the machines to lemons, and second, to overcome operating defects in the Original Cook arising from the action of acid, incident to washing, on the canvas aprons. Of the two, the possibility of entering the lemon field was the "principal reason".

The design was altered in five principal respects. In the first place, the wooden parts were replaced with metal construction. Secondly, the canvas belt and aprons were replaced by metallic link chains and rubberized canvas respectively. Thirdly, the troughs through which the fruit moved were made [206] substantially steeper. Fourthly, a ripple device was placed on the side of the trough to move the fruit into a position so that the long axis would be parallel to the center line of the trough. Lastly, the means of adjusting the movable segment of the trough was changed. In the Original Cook the

guide, or movable segment, was constructed to move horizontally in and out in a direction perpendicular to the length of the trough. In the Improved Cook the movable segment was fixed on an axis at the upper edge, and the width of the aperture in the trough was varied by rotating the movable segment on that axis. (F. W. Cutler; Cook).

The rippling device consisted of small half-round strips of metal fixed on the sides of the trough. As the fruit was carried along the trough on the aprons it would encounter these slight obstructions under the apron and would tend to be moved into a position such that the long axis of the fruit would be parallel to the center line of the trough. (F. W. Cutler).

The experiments were being carried out in defendants' factory in Portland. (F. W. Cutler). Defendants A. B. Cutler and F. W. Cutler testified that late in 1928 plaintiff called at their plant and the machine in its then present stage was shown to him. Plaintiff testified that he did not see the new machine until February, 1929. When plaintiff saw the machine he indicated that he was satisfied with the change in design. (A. B. Cutler; F. W. Cutler; Cook).

The first Improved Cook was shipped on December 24, 1928, to Whittier, California (F. W. Cutler; Defendants' witness Van Wyk), and was put in service for sizing lemons. Representatives of the defendants superintended the installation and stayed on and observed the machine in operation.

The performance [207] of the machine for that purpose, after some changes made at the time of installation, was entirely satisfactory. (F. W. Cutler).

In defendants' catalogues advertising the Improved Cook, issued first in April, 1929 (A. B. Cutler), it is said:

> "After an entirely successful use of the Cook Grader in the field for three years, we have taken on the manufacture and sale of this highly satisfactory machine. We have added many improvements which put the Cook Grader in a class by itself for the efficient sorting of pears, peaches, plums, apricots, lemons and oranges.

On a subsequent page of the same catalogue under a heading, "The Cook Grader for sorting and sizing lemons," it is stated:

> "Lemons are a tender fruit and require very careful handling if injury is to be avoided. Previous to the use of the Cook Grader in the sorting and sizing of lemons, this fruit had been handled only on shallow trays, from which the lemons were sorted and sized by slow and costly hand methods. It had become generally considered that lemons could not be handled by machines, but the Cook Grader has successfully met all the exacting requirements.
>
> "Handles lemons without injury or bruising.
>
> "Sizes lemons very satisfactorily.
>
> "Will make a saving over hand methods of $25.00 to $30.00 a carload.

"Only machine on the market for sizing and sorting lemons.

"The Cook Grader succeeded where other machines failed." (Plaintiff's Exhibit 30, catalogue under name of "Cutler Manufacturing Company").

The same language is repeated in plaintiff's Exhibit 10, a catalogue issued in May, 1930, under the name "Cutler Manufacturing Company—Division Food Machinery Corporation". [208] (A. B. Cutler).

In the 1928 season defendants sold the Original Cook Grader. During that season they sold 28 graders, of which 15 were delivered to users in the Medford district in Oregon, 6 to the Hood River district in Oregon, 2 to California, and 5 to Washington. (Defendants' Exhibit 3, Schedule A).

After the end of the 1928 season, up to May 1, 1929, defendants sold 5 improved Cooks, all to users engaged in the citrus fruit business in California. (Defendants' Exhibit 3, Schedule A). The exhibit shows six sales, but one sale there shown is erroneously listed as a grader. (Van Wyk).

Between May 1, 1929, and December 31, 1929, defendants sold 16 Improved Cooks, distributed as follows: 2 to Medford, Oregon; 1 to Hood River, Oregon; 2 to California; 4 to Washington; 4 to Buenos Aires, South America; and 3 to Capetown, South Africa. (Defendants' Exhibit 3, Schedule C). The Capetown sales were to a machinery dealer, rather than to a user. (Van Wyk).

After January 1, 1930, defendants sold 6 Improved Cooks, 2 to California in January, 1930, 1 to California in February, 1 to Idaho in May, 1 to Hood River, Oregon, in August, and the final sale of 1 to Hood River in September. (Defendants' Exhibit 3, Schedule D).

The identical machine developed for lemons as the Improved Cook was thereafter used for pears. (A. B. Cutler). As stated by defendant F. W. Cutler:

> "It was assumed on our part that, of course, if they (the Improved Cook) worked so satisfactorily in the field with lemons they would work on pears. But much to our surprise, when we got the first machine in operation in Medford, we found that a different condition presented itself with pears than with lemons. We apparently had overlooked the fact that pears are [209] much heavier than lemons and average much bigger. . . . But with the pears we found that in the large sizes especially, with the trough as we had it, steep at that time and hinged at the top and pulling away, . . . that the weight of that pear caused a lag or friction of the rubberized curtain at its lower edge where the pear contacted, . . . and . . . produced a tendency to draw that curtain, and occasionally a pear would be left high and dry, . . . on the bare rails, the curtain having pulled it from underneath, it flipped it over, and there would lie the pear bare on the rail, and the curtains

> when coming out would pass over on top of that obstruction, and other pears coming along would cause a jam. That led to troubles in the curtains, and that led to trouble with the chain on those particular machines."

He stated further that his principal efforts at that time were to "see them (the users) through their season" and,

> ". . . we were accorded the privilege of revising those machines at the end of the season. We corrected the troubles by putting in a different type of trough less steep, and one which did not swing away as illustrated here in the exhibit, creating a steeper trough in the larger sizes, but one which pulled back, more or less the same idea as used on the original Cook, . . . We have never had any of that trouble at all on the lemon machines in California. Conditions apparently are different. All the later machines after 1930 were made of the same type as the machines in Medford were altered."

Plaintiff's witness White described the action of the Improved Cook as first used for pears, in the following language:

> "Well, in the deeper trough the fruit had more of a tendency to get under the belt. The curtains worked over the top of the fruit."

As a result the belts "tangled" and were thrown off the sprockets, and thereby the curtains were torn from the chains. The deep trough had to be changed.

Defendants' service men endeavored to obviate the difficulties, but the defects were not entirely [210] remedied before the 1930 season.

Plaintiff's witness Edmiston stated that when the Improved Cook began to be used for pears it was quickly found that the trough was too steep and caused pears to wedge. It caused a "great deal of trouble" in the 1929 season, and was "very unsuccessful". The machine was altered by defendants at their own expense in the spring of 1930. As so altered, the machine is "very much" better than the Original Cook. The new machine is less expensive to operate, it has greater capacity, the rippling process is satisfactory, and with more bins the new machine can be adjusted more finely.

Plaintiff, in his comments on the design of the Improved Cook as first used for pears, spoke particularly of the fact that the movable segment was hinged so that the lower end moved in an arc. As a consequence the two lower edges of the trough were not upon the same level. Fruit passing down the trough became "lopsided", which caused jamming.

When the Cutler partnership, A. B. Cutler and F. W. Cutler, transferred the partnership assets to the Cutler corporation on February 14, 1930, the partners, as such, ceased to manufacture and distribute Cook Graders. (F. W. Cutler). However, as stated by F. W. Cutler, the partners thereafter caused their successors, the Cutler corporation and Food Machinery Corporation, to assemble and sell the Cook Grader parts on hand on that date. The same witness stated:

"On February 14th the partnership ceased operations; February 14th, 1930, the partnership as it had been operating in the past ceased operation because it sold its plant and equipment with which to manufacture. Remaining on hand at that time were certain parts of Cook Graders, which the contract with Mr. Floyd Cook gave us the right to manufacture [211] and clean up the stock to the extent of ten machines after discontinuance of our contract with him. Based on that provision and that right we caused to have those extra parts manufactured for us and they were sold to clean out that stock."

The Cutler Corporation manufactured no Cook Graders after June 30, 1930. (F. W. Cutler).

The efforts of defendants, the partnership, to market Cook Graders continued throughout 1929, and in January and a part of February, 1930. Thereafter the efforts of the successors of the partnership continued to dispose of the parts on hand received from the partnership. (F. W. Cutler).

The sales of Cook Graders actually made in 1930 were described in detail by defendants' witness Van Wyk. The sales are tabulated in defendants' Exhibit 3, and were as follows:

Date Shipped	Purchaser	Address	No. of Graders
1930			
Jan. 11,	Oxnard Citrus Assn.	Hueneme, California	2
Feb. 28,	Crocker-Sperry	Santa Barbara, Calif.	1
May 24,	Riverside Orchard Co.	Lewiston, Idaho	1
Aug. 13,	Duckwall Bros.	Hood River, Oregon	1
Sept. 10,	Apple Growers' Assn.	Hood River, Oregon	1
		Total	6

Defendants' Exhibit 3, witness Van Wyk, shows defendants' accounting of royalties and commissions earned by and paid to plaintiff during the periods covered thereby. The data therein shown is summarized as follows:

Schedule A—Royalty Statement on sales of Cook Graders May 1, 1928, to April 30, 1929.

1. Number of graders sold	34
2. Total amount of sales,	$28,500.60
3. Deductions for material other than graders included in sale (detailed in Schedule E),	2,312.60
	[212]
4. Gross sale after deduction,	$26,188.00
5. Special discounts granted to certain buyers,	197.85
6. Net sales after discounts,	25,990.15
7. 10% Royalty,	2,599.01

Schedule B—Commissions on sales Medford District—Year 1928.

1. Total sale price Cook Graders, sold,	$16,189.00
2. Commissions earned on (1),	1,965.22
3. Total sale price of equipment other than Cook Graders and attachments,	8,300.30
4. Commissions on (3),	1,245.04

In the foregoing summary item (3) includes the sale price only of equipment, other than Cook Graders and attachments, actually sold by plaintiff under defendants' contention that the so-called "outside contract" did not contemplate payment of commissions to plaintiff on any sales other than those actually made by plaintiff. It does not include sales in the Medford district in 1928 where defendants' records do not show that plaintiff, as salesman, actually negotiated the sale. (Van Wyk).

The Master found (and no exception was taken thereto) that additional royalties should be credited to plaintiff for royalties for graders sold in 1928, in addition to those shown in Schedule A, as follows:

Invoice	Customer	Additional Royalty
9464	Kleinsorge	$ 29.94
9502	Pinnacle Packing Co.	28.50
9583	Kleinsorge	29.25
10024	Apple Growers Assn.	14.50
	Total	$102.19 [213]

Schedule C—Royalty Statement on sales of Cook Graders May 1, 1929, to December 31, 1929.

1. Number of graders sold,	16
2. Total amount of sales,	$20,347.03
3. Deductions for material other than graders included in sale (See Schedule E),	3,373.53
4. Gross sale after deductions,	16,973.50
5. Special discounts granted to certain buyers,	985.02
6. Net sales after discounts,	15,988.48
7. 10% Royalty,	1,598.85

Schedule D—Royalty Statement on sales of Cook Graders, 1930.

1. Number of graders sold,	6
2. Total amount of sales,	$10,137.30
3. Deductions for materials other than graders included in sale (See Schedule E),	1,907.80
4. Gross sale after deduction,	8,229.50
5. Special discounts granted certain buyers,	137.87
6. Net sales after discounts,	8,091.63
7. 10% Royalty,	809.16

The Master found (and no exception was taken thereto) that additional royalties should be credited to plaintiff for royalties on graders sold during the period from May 1, 1929, to the end of the period covered by defendants' sales, in the amount of $15.00, being two items of $7.50 each.

Defendants' Exhibit 3, page 1, likewise shows payments made by defendants to plaintiff, classified by witness Van Wyk, who presented the exhibit, as follows: [214]

Date	Under Contract	Outside of Contract	Grand Total
1928			
June 5,	$ 300.00		
30,	300.00		
July 5,		$ 8.66	
17,		8.28	
Aug. 1,	300.00		
31,		1,000.00	
31,	300.00		
Oct. 1,	300.00		
31,	300.00		
Dec. 1,	300.00		
24,	1,909.94	224.88	
1929			
Jan. 2,	300.00		
Feb. 1,	300.00		
Mar. 1,	300.00		
Apr. 1,	300.00		
May 1,	300.00		
Feb. 25,		3.22	
Sub-total	$5,509.94	$1,245.04	$6,754.98
1930			
Jan. 27,	1,818.50		
July 9,	465.46		
9,	465.47		
Sub-total	$2,749.43		$2,749.43
Grand total	$8,259.37	$1,245.04	$9,504.41

The item of $3.22 on February 25, 1929, was a charge for freight on material ordered by plaintiff for a customer, and refused by the customer. (Van Wyk). The Master found that that was an improper charge against plaintiff, and no exception to that finding was made by any of the parties.

Plaintiff's Exhibit 60, witness Wright, is a tabulation made by the witness from the records of defendants, the partners, and Cutler corporation. (Wright). Included therein is the data relating to sales by defendant partnership in the [215] Medford district in 1928 of material other than Cook Graders and attachments. Sales of materials shown therein, but not included in the tabulations of defendants' Exhibit 3, are as set forth in the Master's Report, and Exhibit B thereto.

Between May 4, 1928, and December 24, 1928, sales by the defendants, the partners, of Cook Graders in all territories, of Cook Graders and attachments in the Medford district only, and of material other than Cook Graders and attachments in the Medford district only, were as follows:

	Between 5/4 and 8/31/28	Between 5/4 and 12/24/28
1. Sales of Cook Graders in all territories on which 10% royalty was due (Defendants' Exhibit 3, Schedule A),	$18,711.75	$19,584.15
2. 10% royalty on total Item (1)	1,871.17	1,958.41
3. Sales of Cook Graders and attachments in Medford district only on which defendants were to pay commission (Defendants' Exhibit 3, Schedule A),	16,189.00	16,189.00
4. Commission due on Item (3) Per Defendants' Exhibit 3, Schedule A,	1,965.22	1,965.22
5. Sales of material in Medford district other than Cook Graders and attachments, upon which commissions were due, as shown in Defendants' Exhibit 3, Schedule A,	8,300.30	8,300.30
6. Commissions due on Item (5) per Defendants' Exhibit 3, Schedule A,	1,245.04	1,245.04
7. Sales of material in Medford district other than Cook Graders, not included in Defendants' Exhibit 3, but shown in Plaintiff's Exhibit 60,	1,552.90	2,133.56
8. 15% of Item (7),	232.94	320.03

On August 31, 1928, defendant partners paid plaintiff $1,000.00. This payment is shown in defendants' Exhibit 3 as [216] a payment on commissions due on sales of material other than Cook Graders and attachments in the Medford district.

The occasion for this payment of $1,000.00 was described by defendants' witness Van Wyk, as follows:

"Q. . . . What was that $1000.00 for?

A. That was an advance on commissions.

Q. Commisisons only, or commissions and royalties?

A. At that time it was given for commissions only."

"Yes, I remember Mr. Cook asking whether he could not have a settlement on his commission account, and I informed him at the time that it was difficult during our rush season to get up a detail, but that according to our records he possibly was entitled to an advance of somewhere around a thousand dollars, which was given to him at that time, covered by our check A-2008 on August 31st."

"Q. . . . Was that (the $1000.00 payment) on the basis of something earned, or an advance?

A. That was an advance."

"The check was issued as an advance on commissions which we considered due Mr. Cook at the time."

Plaintiff testified as to the occasion for the payment as follows:

"Q. Now, as I understand it, that had nothing to do with the royalty part of the business, but had sole reference to this sales commission of fifteen percent? . . .

A. It was a payment on account of what they owed me at that time.

Q. Of all items of every nature; is that what you mean?

A. Yes, sir; whatever I had coming to me; that was a payment on account of whatever I might have had coming to me at that time."

On December 24, 1928, defendant partners paid plaintiff [217] $2,134.82 in a single check, which is distributed in defendants' Exhibit 3 as $1,909.94 on royalties and commissions due under the written contract of May 5, 1928, and $224.88 on commissions due outside of the written contract. This payment was explained by defendants' witness Van Wyk as follows:

"Q. . . . under date of December 24th you have a check, apparently one check, covering two amounts, $1909.94 in the column 'Under Contract' and $224.88 in the column 'Outside of Contract'. What was this 'Outside of Contract' item for? . . .

A. It was payment for commissions and royalties, as I remember it.

Q. Well, that is, the whole check was?

A. Yes, it was merely divided up as a matter of segregating the commissions from the royalties. . . .

A. In making up this statement I attempted to segregate the royalties from the commissions, and therefore made these two headings, one 'Under Contract' and the other 'Outside of Contract.' "

Plaintiff's witness Reter discussed the extent to which Pacific Coast fruit districts are supplied

with sizers. In the Medford district in Oregon there is still one house that sorts by hand, but he could name no houses in the Hood River district in Oregon or the Wenatchee district in Washington that were not equipped with sizers. In those California districts devoted exclusively to pears "there is still a volume of fruit packed without any sizing equipment". In 1928, 1929 and 1930 there should have been a good market for machines to size lemons, because up to that time the universal practice had been to size by hand.

In 1928 it was not customary to use sizers for pears [218] in the Wenatchee and Yakima districts in Washington. (Cook).

Defendant F. W. Cutler stated that the three factors which determine the market for fruit machinery are the size of the crop, the financial condition of prospective purchasers, and the degree of saturation of the market. The year 1930 was a disastrous one financially in the pear districts. In 1931 the pear crop was small, but the return was "fairly advantageous compared with other fruit". In Hood River they had "only a fairly good crop and fairly good prices". The financial conditions of the fruit grower indirectly affect the ability of the packer to purchase machinery.

Defendants' witness Van Wyk stated that, as sales manager for defendants, he did not notice a shortage of cash available for equipment prior to 1930, "but during 1930 we ran into it". Sales had to be made on easier terms. The year 1931 was

worse than 1930. On the Pacific Coast fresh fruit is not yet all sized by machine. "No, indeed not. Similar to apples, a great deal of it is still done by the packer himself or herself. . . . It is done by eye." In the Yakima district a considerable number of sorting belts, as distinguished from sizing machines, are used for both apples and pears. East of the Rocky Mountains, pears are usually packed loose. Some sizing may be done, but machines are not used.

Defendants' witness Van Wyk presented defendants' Exhibit 10, containing two graphs of sales by the Stebler-Parker Company, Sprague-Sells Company, John Bean Manufacturing Company and Cutler Manufacturing Company, four of the constituent divisions of Food Machinery Corporation. The data shown therein covers only sales of machines for grading pears. No manufacturers in the United States, other than the four [219] named, manufacture a pear grader. The data shown in the graphs, reduced to tabular form, is as follows:

Pear Grader Sales (Dollars)

Year	Total Sales Four Companies	Total Sales Cutler	Total Sales Three Companies (Exhibit of Cutler)
1925	$ 6750		$ 6750
1926	12075		12075
1927	30417		30417
1928	47445	$19585	27860
1929	36808	22393	14415
1930	18416	8091	10325
1931	21660		21660

Pear Grader Sales (Numbers of Machines)

Year	Total Sales Four Companies	Total Sales Cutler	Total Sales Three Companies (Exhibit of Cutler)
1925	25		25
1926	45		45
1927	122		122
1928	107	28	79
1929	42	22	20
1930	26	6	20
1931	20		20

Cutler Manufacturing Company manufactured and sold no pear grader prior to the commencement of manufacture and sale of the Cook Grader in 1928 (A. B. Cutler), and sold no pear grading machine after 1930. (Van Wyk).

Plaintiff's Exhibit 24 is a statement made by John Bean Manufacturing Company, a division of defendant Food Machinery Corporation, showing sales of "Clear" V-type sizers by that division as follows (F. W. Cutler):

From	To	Number	Price
Feb. 28, 1929	March 29, 1930	12	$12,450.00
Mar. 30, 1930	June 25, 1930	4	5,400.00
June 26, 1930	Oct. 31, 1931	14	19,960.00
	Total	30	$37,900.00

[220]

Plaintiff's Exhibit 25 is a statement by Citrus Machinery Co. (by Fred Stebler), likewise a division of Food Machinery Corporation, showing sales

of "Clear" V-type sizers by that division as follows (F. W. Cutler):

From	To	Number	Price
Feb. 28, 1929	March 29, 1930	0	
Mar. 30, 1930	June 25, 1930	4	$ 2,530.00
June 26, 1930	Oct. 31, 1931	25	17,887.12
	Total	29	$20,417.12

The Citrus Machinery Company is listed in Plaintiff's Exhibit 17 (an article announcing the proposed merger which later became Food Machinery Corporation) as Florida Citrus Machinery Company.

Defendants' Exhibit 6, a letter written by one Crummey, of John Bean Company, to defendant F. W. Cutler, on May 28, 1928, urging the Cutlers to merge with the Bean Company, says in part:

> "After our dinner to the citrus industry in Los Angeles next Wednesday Mr. Stebler and I expect to visit the citrus districts in Texas and Florida. I feel sure that together we will render a greatly improved service over anything heretofore known to the citrus industry."

Plaintiff's witness Newman, agricultural statistician, Bureau of Agricultural Economics, United States Department of Agriculture, gave figures from the department year book, Crops and Markets, for production of pears, as follows:

	1928	1929	1930	1931
Production, bushels (000 omitted)				
Oregon	2,700	2,750	3,200	1,955
Washington	3,700	3,322	4,463	3,650
California	9,355	7,917	11,334(1)	8,917(1)

[221]

	1928	1929	1930	1931
Carload shipments, by years beginning July 1				
Oregon	4,437	4,211	5,116	2,678(2)
Washington	5,686	4,035	6,157	4,457(2)
California:				
Northern Division	8,044	6,936	9,711	
Central & Southern Division	2,959	2,529	3,780	2,213(2)(3)

(1) Includes some quantities not marketed on account of market condition as follows: 1930—1,292; 1931—458.

(2) 1931 carload figures only July 1, 1931, to January 1, 1932.

(3) Includes only central division.

Carload data do not differentiate between boxed fruit and shipments to canneries, and to extent that some pears may be shipped twice, there are duplications.

The pear season in the Medford district begins about August first. (Kyle). The pear season on the Pacific Coast ends about October 1st. The lemon season is December and January. (F. W. Cutler). [222]

THIS IS TO CERTIFY that the foregoing statement of evidence is hereby allowed and approved and declared that the same contains a statement of all of the evidence in said cause bearing the questions involved in the appeal in this cause, that said portions of said evidence which are repro-

duced in the exact words of the witnesses are so produced at the request of one or the other of the parties to said cause and by direction of the Court in order to properly present the effect thereof. The said statement of the evidence is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above entitled cause as provided in Paragraph (b) of Equity Rule 75.

Done and dated in open Court this 21st day of March, 1934.

JOHN H. McNARY,
United States District Judge for
the District of Oregon.

To the Judge of the above entitled Court:

The undersigned, solicitors for the plaintiff in the above entitled cause, hereby certify that the foregoing statement of evidence contains all amendments and additions to the form of statement of evidence prepared by the defendants and appellants, and said plaintiff hereby waives additional time to file objections, amendments or requests for additional parts of the record to be made a part of said statement and consents that the Court may certify said statement at any time after the presentation thereof to him for certification, without awaiting the time provided by rule of Court.

CAREY, HART, SPENCER & McCULLOCH,
Solicitors for Plaintiff.

[Endorsed]: Filed March 21, 1934. [223]

AND AFTERWARDS, to wit, on the 16th day of March, 1934, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit: [139]

[Title of Court and Cause.]

PETITION ON APPEAL.

Come now defendants Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, defendants in the above entitled cause, and conceiving themselves to be aggrieved by the decree of the above entitled Court, made and entered in the above entitled cause on the 20th day of December, 1933, do and each of them does hereby appeal from said decree so entered herein and from the whole thereof, and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that their appeal be allowed and that a transcript of the record and proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit [140] Court of Appeals for the Ninth Circuit, sitting at San Francisco, under the rules of such Court in such cases made and provided.

It is further stated that whereas no money decree is assessed against the Food Machinery Corporation said decree provides for levying execution against the property coming into the hands of the Food

Machinery Corporation which was formerly the property and assets of the other defendants, and Food Machinery Corporation joins in this appeal to the extent that the said decree is against it and for the purpose of completing, maintaining and preserving the record on said appeal, and your petitioners further pray that the proper order relating to the required security to be required of them be made.

ASA B. CUTLER,
By James G. Wilson, John F. Reilly,
His Solicitors.
FRANK W. CUTLER,
By James G. Wilson, John F. Reilly,
His Solicitors.
Individually and as co-partners doing business as Cutler Manufacturing Co.
CUTLER MANUFACTURING COMPANY, INC.,
an Oregon Corporation.
By James G. Wilson, John F. Reilly,
Its Solicitors.
FOOD MACHINERY CORPORATION,
a Delaware Corporation.
By James G. Wilson, John F. Reilly,
Its Solicitors.

[Endorsed]: Filed March 16, 1934. [141]

AND AFTERWARDS, to wit, on the 16th day of March, 1934, there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit: [142]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Asa B. Cutler and Frank W. Cutler, individually and co-partners under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon Corporation, and Food Machinery Corporation, appellants, hereby submit and herewith file their

ASSIGNMENT OF ERRORS.

asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and say that in the record and proceedings aforesaid there is manifest error in this:

I.

That the Court erred in finding, holding and deciding that under the contract of May 4, 1928, and particularly Para- [143] graph Eleventh thereof that if the defendants Asa B. Cutler and Frank W. Cutler should sell their business, they, the said Asa B. Cutler and Frank W. Cutler, were obligated to continue to manufacture the Cook Grader, and on failure so to do it was a breach of said contract of May 4, 1928.

II.

That the Court erred in holding and deciding that Paragraph Eleventh of the contract of May 4, 1928

was a cumulative remedy made available to the plaintiff and did not prescribe the exclusive remedy open to the plaintiff in the event the defendants Asa B. Cutler and Frank W. Cutler should sell their business, and in not limiting the plaintiff to his right to cancellation of said contract and the taking back of all rights under said patent on the happening of the event of sale and the inability of the said plaintiff to persuade the said purchaser to manufacture the Cook Grader to the exclusion of any competing machine.

III.

That the Court erred in not holding and deciding that the parties had prescribed in their contract the exclusive rights of the said parties in the event of the sale of the business by Asa B. Cutler and Frank W. Cutler.

IV.

That the Court erred in holding that said contract, and particularly Paragraph Eleventh thereof, did not permit the defendants Asa B. Cutler and Frank W. Cutler to sell their business without incurring a penalty as for the breach of said [144] contract.

V.

That the Court erred in holding that under Paragraph 7 of said contract the parties contemplated that the royalties and commissions thereunder should at least equal the sum of $15,000.00 up to October 1, 1931, and measuring the damages of the

plaintiff up to that point by the difference between the amount of royalties and commissions paid under said contract and the said sum of $15,000.00.

VI.

That the Court erred in holding and deciding that because no notice was given by the defendants to the plaintiff on or about October 1, 1931 of the cancellation of said contract that said contract continued in effect until October 1, 1933.

VII.

That the Court erred in holding and deciding that the general damages sustained by the plaintiff until October 1, 1933 amounted to the sum of $5,000.00.

VIII.

That the Court erred in failing to hold and decide that there was no evidence to sustain any general damages and that the damages should have been limited, if any, to the amount of royalties which would have been earned up to and including the 1st day of October, 1931.

IX.

That the Court erred in not holding and deciding that by the commencement of said action prior to the 1st day of October, 1931 that said defendants elected to treat the sale of said business by the defendants Cutler and Cutler Manufacturing Company as a breach of said contract and that his damage was limited to actual damages consisting of the amount of royalties [145] which he would have earned up to October 1, 1931.

X.

That the Court erred in holding and deciding that no notice of cancellation of said contract was given and that the commencement of said action was not a waiver on the part of the plaintiff of any written notice of such cancellation on and after October 1, 1931.

XI.

That the Court erred in holding that the finding of the Master that the general damages should be assessed at $5,000 is supported by material and adequate evidence and in failing to hold that there was no evidence of any general damages.

XII.

That the Court erred in overruling and denying Exception No. 1 submitted by the defendants to the Master's Report.

XIII.

That the Court erred in overruling and denying Exception No. 2 submitted by the defendants to the Master's Report.

XIV.

That the Court erred in overruling and denying Exception No. 3 submitted by the defendants to the Master's Report.

XV.

That the Court erred in overruling and denying Exception No. 4 submitted by the defendants to the Master's Report.

XVI.

That the Court erred in overruling and denying Exception No. 5 submitted by the defendants to the Master's report.

XVII.

That the Court erred in overruling and denying Exception No. 6 submitted by the defendants to the Master's Report. [146]

XVIII.

That the Court erred in overruling and denying Exception No. 7 submitted by the defendants to the Master's Report.

XIX.

That the Court erred in deciding said case in favor of the plaintiff and against the defendants.

XX.

That the Court erred in failing to find in favor of the defendants Asa B. Cutler and Frank W. Cutler and Cutler Manufacturing Company, Inc., on their counterclaim pleaded in their answer.

XXI.

That the Court erred in decreeing any right to issue execution against any property acquired by the Food Machinery Corporation from the other defendants in said cause in the event execution against the other defendants should be returned unsatisfied.

XXII.

That the Court erred in not decreeing that said contract of May 4, 1928 lacked mutuality in that it

recognized the right of the defendants Cutler to sell their business and as interpreted gave to the plaintiff an option to cancel the contract without any corresponding right on the part of the defendants Cutler.

XXIII.

That the Court erred in not holding and deciding that the so-called agency contract of the plaintiff at Medford for the year 1928 did not give the plaintiff the right to a commission on all sales in the Medford district during said year, but gave to the plaintiff only the right to a commission upon sales made [147] or induced by the plaintiff.

XXIV.

That the Court erred in not decreeing the costs in this case in favor of the defendants and against the plaintiff, and particularly the Court erred in not decreeing costs in favor of the Food Machinery Corporation.

XXV.

That the Court erred in the event that the said decree should be affirmed in any particular in not decreeing to the defendants and against the plaintiff costs and disbursements, and particularly reporter's fees, and the cost of the transcript for the taking of all testimony on the issues decided in favor of the defendants.

And the said defendants Asa B. Cutler and Frank W. Cutler, individually, and as co-partners, and Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation,

a Delaware corporation, respectfully pray that the decree, order and judgment aforesaid may be reversed.

ASA B. CUTLER,
FRANK W. CUTLER,
Individually and as co-partners under the firm name of Cutler Manufacturing Co.
By Wilson & Reilly,
Their Solicitors.
CUTLER MANUFACTURING COMPANY, INC.,
By Wilson & Reilly,
Its Solicitors.
FOOD MACHINERY CORPORATION,
By Wilson & Reilly,
Its Solicitors.

JOHN F. REILLY,
JAMES G. WILSON,
Solicitors for defendants
and Appellants.

[Endorsed]: Filed March 16, 1934. [148]

AND AFTERWARDS, to wit, on Friday, the 16th day of March, 1934, the same being the 11th Judicial day of the Regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [149]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

And now, on this 16th day of March, 1934,

IT IS ORDERED that the appeal of the defendants in the above entitled cause, to wit: Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, be allowed as prayed for, and

IT IS FURTHER ORDERED that a bond in the sum of $750.00 in form and with sureties approved by the Court, be given for the payment of all costs which may be hereafter assessed against said defendants and appellants in the United States Circuit Court of Appeals for the Ninth Circuit, and conditioned that the said defendants and appellants will prose- [150] cute such appeal to effect and answer all costs if they or either of them fail to procure a reversal of said decree by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 16th, 1934.

JOHN H. McNARY,
Judge of the District Court of the United States for the District of Oregon.

[Endorsed]: Filed March 16, 1934. [151]

AND AFTERWARDS, to wit, on the 16th day of March, 1934, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit: [152]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Asa B. Cutler and Frank W. Cutler, individually, and as co-partners doing business under the firm style and name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, as principals, and Paul Van Wyk, as surety, are held and firmly bound unto Floyd J. Cook, plaintiff in the above entitled cause, jointly and severally, in the sum of $750.00 to be paid to the said Floyd J. Cook, his heirs, representatives and assigns, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, representatives, successors and assigns, firmly by these [153] presents.

Sealed with our seals and dated this 16th day of March, 1934.

WHEREAS, the above named defendants, Asa B. Cutler and Frank W. Cutler, individually and as co-partners doing business under the firm style and name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, have appealed to the United States

Circuit Court of Appeals for the Ninth Circuit to reverse the decree and judgment in the above entitled cause by the District Court of the United States for the District of Oregon, dated, signed and entered the 20th day of December, 1933,

NOW THEREFORE, the condition of this obligation is such that if the above named defendants Asa B. Cutler and Frank W. Cutler, individually and as co-partners under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, appellants, shall prosecute said appeal to effect and answer all costs awarded against them, or either of them, if they, or either of them, shall fail to make good their plea than then this obligation shall be void, otherwise to remain in full force and virtue.

President.

ASA B. CUTLER
FRANK W. CUTLER
Individually and as co-partners under the firm name of Cutler Manufacturing Co.

[Seal] CUTLER MANUFACTURING COMPANY, INC.
By Asa B. Cutler
President.
Attest: Paul Van Wyk
Secretary. [154]

[Seal] FOOD MACHINERY CORPORATION
By F. W. Cutler
Vice President.
Principals.

[Seal] PAUL VAN WYK
Surety.

State of Oregon,
County of Multnomah.—ss.

On the 16th day of March, 1934, personally appeared before me Paul Van Wyk, known to me to be the individual described in and who executed the foregoing instrument as surety, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth, and said Paul Van Wyk being by me duly sworn did say that he is a resident and householder of the County of Multnomah, State of Oregon, and that he is worth the sum of $1500.00 over and above his just debts and legal liabilities and property exempt from execution.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Notarial Seal the day and year first above in this my certificate written.

F. D. HUNT, JR.,
Notary Public for Oregon.

My Commission expires: Feb. 9, 1937.

The foregoing bond is approved both as to sufficiency and form this 16th day of March, 1934.

JOHN H. McNARY,
Judge.

[Endorsed]: Filed March 16, 1934. [155]

AND AFTERWARDS, to wit, on the 21st day of March, 1934, there was duly filed in said Court, a Praecipe for Transcript, in words and figures as follows, to wit: [224]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above entitled Court:

You will please prepare and certify to constitute the record on appeal in the above case the transcript of the following, omitting endorsements, acceptances of service, etc., the record to be printed in San Francisco:

(1) Praecipe.

(2) Bill of Complaint.

(3) Answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. (Note: The answer of Food Machinery Corporation is omitted for the reason that as far as the questions on appeal of this cause are concerned its answer to the complaint with the answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc.) Please omit Exhibits attached to Answer. [225]

(4) Reply to answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. (Note: Reply to answer of Food Machinery Corporation is omitted for the reason that as far as the questions on appeal herein are concerned it is identical with that of the reply to the answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc.)

(5) Statement of the Evidence.

(6) Master's Report.

(7) Plaintiff's Exceptions to Master's Report.

(8) Exceptions of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. to Master's Report.

(9) Exceptions of Food Machinery Corporation to Master's Report.

(10) Memorandum Opinion of Court.

(11) Objections of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. to proposed Findings of Fact and Conclusions of Law.

(12) Order overruling objections of Asa B. Cutler, et al, to Findings of Fact and Conclusions of Law.

(13) Findings of Fact and Conclusions of Law.

(14) Final Decree.

(15) Petition of Defendants for Appeal.

(16) Order allowing Appeal and Fixing Bond.

(17) Bond on Appeal.

(18) Defendants and Appellants Assignment of Errors.

(19) Citation on Appeal.

JOHN F. REILLY
JAMES G. WILSON
Solicitors for Defendants and Appellants, Asa B. Cutler, F. W. Cutler, Cutler Manufacturing Company, Inc. and Food Machinery Corporation.

[Endorsed]: Filed March 21, 1934. [226]

[Title of Court and Cause.]

CITATION.

The President of the United States of America.

To Floyd J. Cook:

Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a notice of appeal and order of the Court allowing the same, filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein yourself Floyd J. Cook is the plaintiff and Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon [1] corporation, Food Machinery Corporation, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. Cutler, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation and Cutler Manufacturing Company, a division of Food Machinery Corporation, are defendants, to show cause, if any there be, why the decree and judgment rendered against the defendants and in favor of yourself, as plaintiff, should not be corrected and speedy justice be done to the parties in that behalf.

WITNESS the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 16th day of March, 1934.

JOHN H. McNARY,

United States District Judge

Due and personal service of the above citation, and the receipt of a copy thereof, is hereby admitted this 16th day of March, 1934.

CAREY, HART, SPENCER & McCULLOCH,
Solicitor for Complainant,
Floyd J. Cook.

[Endorsed]: Filed Mar. 16, 1934. [3]

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 4 to 226 inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Floyd J. Cook is plaintiff and appellee, and Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Company, Cutler Manufacturing Company, Inc., an Oregon corporation, Food Machinery Corporation, a Delaware corporation, are defendants and appellants; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and has been by me compared with the original thereof, and is a full, true and complete transcript of the record and proceedings had in said Court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $38.65, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 31st day of March, 1934.

[Seal] G. H. MARSH,
Clerk. [227]

[Endorsed]: No. 7454. United States Circuit Court of Appeals for the Ninth Circuit. Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, Food Machinery Corporation, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. Cutler, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation, Appellants, vs. Floyd J. Cook, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 7, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7454

United States Circuit Court of Appeals

For the Ninth Circuit

ASA B. CUTLER and FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

Appellants,

vs.

FLOYD J. COOK,

Appellee.

Brief of Appellants

Upon Appeal from the District Court of the United States For the District of Oregon.

JAMES G. WILSON,
JOHN F. REILLY,
Platt Building, Portland, Oregon,
Solicitors for Appellant.

CAREY, HART, SPENCER & McCULLOCH,
FLETCHER ROCKWOOD,
Yeon Building, Portland, Oregon,
Solicitors for Appellee.

INDEX

CASES AND AUTHORITIES

CASES AND AUTHORITIES—Continued

No. 7454

United States
Circuit Court of Appeals
For the Ninth Circuit

ASA B. CUTLER and FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

Appellants,

vs.

FLOYD J. COOK,

Appellee.

Brief of Appellants

Upon Appeal from the District Court of the United States For the District of Oregon.

STATEMENT OF CASE

On May 4, 1928, appellants F. W. Cutler and Asa B. Cutler, partners doing business under the name of Cutler Manufacturing Co., and engaged in the manufacture and sale of fruit machinery at Portland, Ore-

gon, entered into a contract with Floyd J. Cook, appellee, which is set out in full at R. pp. 121-131. The salient features of this contract were as follows:

> "1. (Contract, paragraph 1.) The patentee granted to the licensees the exclusive right to manufacture and sell the Cook Grader, with all modifications, alterations, improvements, including attachments thereto, and means of delivering or receiving fruits, sold in connection with the Cook Grader, for a term commencing May 1st, 1928, and ending September 30th, 1933.
>
> "II. (Contract, paragraph 1.) The licensees agreed, during the term of the license, not to manufacture any fruit grading machine of the same nature or used for the same purposes, except such as were then being manufactured by them.
>
> "III. (Contract, paragraph 2.) The patentee agreed to diligently prosecute a reissue of the patent and granted to the licensees the exclusive right of manufacture and sale under such reissue.
>
> "IV. (Contract, paragraph 3.) The licensees agreed to manufacture the Cook Grader to make all necessary blue prints, patterns, jigs, and designs for such manufacture, which then became the property of the licensee.
>
> "V. (Contract, paragraph 3.) The licensees agreed that all Cook Graders should be manufactured from good materials and with good workmanship in keeping with approved methods of mechanical practice and manufacture.
>
> "VI. (Contract, paragraph 4.) The licensees were bound to place the Cook Grader on the market and promote its sale and advertise it with the same diligence with which it promoted the sale of any other machines or products manufactured by them.

"VII. (Contract, paragraph 5.) All orders for graders obtained by the patentee at the date of the contract were assigned to the licensee, who assumed all obligations of the patentee and agreed to fill them promptly.

"VIII. (Contract, paragraph 5.) The licensees bought from the patentee all materials on hand.

"IX. (Contract, paragraph 6.) The licensees agreed to pay the following royalties:

a. 10% of the amount of the sale price of all equipment sold by the licensees, but not less than $50.00 for each fruit grader with a sizing portion of thirty feet or longer, and a minimum royalty for smaller machines in proportion to the length of the sizing portion thereof.

b. All royalties to be due and payable on May 1st, 1929, except that the sum of $300.00 thereof should be paid at the end of each calendar month for a period of twelve months.

c. If on May 1st, 1929, royalties and commissions accruing, exceeded $3600.00 (the amount of the monthly advances) the licensees were at that time to pay the difference. If they were less than $3600.00 that sum should be considered as guaranteed royalties and commissions and the deficit not charged to the patentee.

d. Beginning May 1st, 1929, accruing royalties became payable at the end of each calendar month for all shipments and all deliveries made by the licensees during said month and within fifteen days prior to the end of the month.

e. The licensees obligated themselves to deliver to the patentee on or before the 15th day of each month a written statement showing the amounts of sales, made during the preceding cal-

endar month, with the names and addresses of the customers, and all equipment shipped and/or delivered during each month.

"X. (Contract, paragraph 6.) In addition to the foregoing, the licensees agreed to pay the patentee:

a. A commission of 15% of the amount of all sales of Cook Graders and attachments in the Medford district during the year 1928.

b. A further sum of 15% on all sales of equipment to Henry E. Kleinsorge of Sacramento and the Earl Cook Company of California during the year 1928; provided, that the commission should not be paid on more than four Cook Graders sold to said purchasers.

"XI. (Contract, paragraph 7.) In the event that the commission for the year 1928 and the royalties accruing to October 1, 1931, did not equal or exceed $15,000.00, the licensees agreed to pay such sum as might be necessary to bring up the total to $15,000.00, PROVIDED that the licensees retained the option to withhold payment and cancel the contract by giving the patentee notice in writing to that effect.

"XII. (Contract, paragraph 7.) If the licensees did not pay the deficit last mentioned the patentee had the right at his option to cancel by giving ten days' notice.

"XIII. (Contract, paragraph 7.) In the event of cancellation under XI and XII hereof, the licensees had no further right to manufacture or sell the Cook Grader, or any reissue thereof, or any improvements, alterations or modifications of the machine.

"XIV. (Contract, paragraph 8.) Breach by either party of the terms and conditions of the contract gave the other the right to cancel upon giving notice of the specified breach provided, however, that the offending party should have thirty days after such notice within which to make good the breach.

a. Cancellation did not relieve the guilty party from liabilities then existing thereunder.

"XV. (Contract, paragraph 10.) On expiration or earlier termination of the agreement, the patentee obtained exclusive ownership of all improvements, attachments and designs relating to the Grader, or its attachments developed after the date of the contract, irrespective of the party by whom made.

b. Patentable improvements made during the term of the agreement would be made by and at the expense of the patentee.

c. At the expiration or earlier termination of the contract, patentee had the option for thirty days to take over from the licensees all patterns, blue prints, jigs and designs relating to the manufacture of the devises, or the improvements or alterations thereon, at cost.

d. At the expiration or earlier termination of the contract, the patentee had the option for thirty days to take over from the licensees all machines and materials on hand at cost.

e. If the patentee did not exercise this option the licensees were given the right to complete machines in process of manufacture and sell such machines, and any others then on hand, not exceeding, however, ten machines in number, upon which the licensees agreed to pay the same royalties.

"XVI. (Contract, paragraph 11.) If during the term of the contract the licensees sold their business, the patentee had the option,

a. Either to require the purchaser to assume and discharge all of the licensee's obligations under the contract;

b. To cancel and terminate the agreement, put an end to the licensee's right thereunder, and prevent any such rights passing to the purchaser."

The present controversy arose out of Paragraphs Seventh and Eleventh and we accordingly set them out in full:

"SEVENTH: In the event that the commissions for the year 1928 and royalties accruing hereunder to October 1, 1931, do not equal or exceed the sum of $15,000.00, then the company on October 1, 1931, shall pay to the second party such sum as shall be necessary to bring the said total up to $15,000.00, provided that the company shall have the option to withhold payment of such deficit and cancel this contract by giving the second party notice in writing to that effect; and provided further that if the company shall not pay such deficit on or before October 1, 1931, then the second party shall have the right at his option to cancel this contract by giving 10 days notice in writing to the company to that effect; and in the event this contract is so cancelled by either party as herein provided, then said second party shall have the right to manufacture and sell machines, equipment, devices, and attachments, described in said patent or reissue thereof, and all modifi-

cation, alterations and improvements thereof without any claims in favor of the company therein or thereto, as fully as if this agreement had not been made."

"ELEVENTH: If during the term of this contract the company shall sell its business, the second party shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights hereunder and prevent any rights hereunder from passing to such purchaser from the company."

Following the execution of this contract the Cutler partnership began the manufacture and sale of the Cook Grader, and at the end of the 1928 season, which ended about October 1, 1928, made certain changes in the design of the Cook Grader, and during 1929 manufactured and sold a so-called "Improved Cook Grader."

For several years prior to 1929 the John Bean Manufacturing Company (whose name was afterwards changed to Food Machinery Corporation) made frequent overtures to the Cutlers to buy the assets of the Cutler partnership or merge the partnership with the John Bean Manufacturing Company. These overtures were rejected. In the summer of 1929 further overtures resulted in a tentative agreement looking to a sale of the Cutler partnership assets to the John Bean Manufacturing Company. Appellee, Cook, was advised by

the Cutlers of the proposed sale and notified by them that the John Bean Manufacturing Company was manufacturing a Pear Grader known as the Clear Grader which was in competition with the Cook Grader. Suggestion was made to Cook that the purchaser would permit the Cutler plant to continue the exclusive manufacture and sale of the Cook Grader or that the Cook Grader might be manufactured and sold by all of the units of the purchaser along with the Clear Grader. Appellee rejected the suggestions, insisted upon the exclusive feature of his contract, and stated he would not permit the Cook Grader to be manufactured by the Cutler plant if the purchaser at the same time made the Clear Grader at any of its other plants. (R. 160, 181).

The contract just referred to between the Cutlers and the John Bean Manufacturing Company was not carried out, but negotiations and discussions continued between the officers of the Food Machinery Corporation (John Bean Manufacturing Company) and the Cutlers and between the Cutlers and appellee Cook. The Cutlers organized a corporation,—Cutler Manufacturing Company, Inc.,—articles being filed in November, 1929, and the corporation being organized in February, 1930. To this corporation the Cutler partnership transferred its assets in February, 1930. In March, 1930, the Cutler corporation agreed to transfer its assets, not, however, including the Cook contract, to Food Machinery corporation, and this contract was performed by the transfer in June, 1930, to Food Machin-

ery Corporation of the assets of the Cutler corporation, not including the Cook contract.

In the late fall of 1929 and during the progress of the further negotiations between the Cutlers and Food Machinery Corporation the offer was made to appellee, Cook, by the Food Machinery Corporation to take over the Cook contract if the exclusive feature was eliminated, or, in the alternative, to have the Cutler plant continue to manufacture Cook Graders exclusively. These offers were rejected by Cook. (Master's Report, R. 63-4, Court's Finding XI, R. 134-5).

In December, 1930, appellee commenced this suit by a bill in equity reciting that during 1925 he conceived and commenced construction of a Fruit Grader for which he was granted a patent in 1927, and that he was and still is the owner of said invention; that on May 4, 1928, he was manufacturing and selling his graders successfully and profitably and in competition with the Cutler partnership; that the Cutlers, to eliminate competition and procure plaintiff's machine, solicited the exclusive right to manufacture and sell it and threatened plaintiff that, if he did not agree, they would make a machine so closely similar as to interfere with plaintiff's trade and nullify his patent rights; that, influenced by their threats, appellee entered into the contract of May 4, 1928; that the Cutlers intended at all times to undermine plaintif's trade and suppress his machine for the benefit of their other products; that, in pursuance of this scheme, the Cutlers made changes

in the Cook machine, impairing its efficiency, thereby destroying the market for the machine; that the Cutler partnership was incorporated and the corporation was then merged with and became a division of Food Machinery Corporation; prior to the merging of the Cutler corporation into it, Food Machinery Corporation had obtained the exclusive right to manufacture Clear Graders; that the Food Machinery Corporation refused to carry out the contract of May 4, 1928; that the acts of the Cutlers, individually, and as partners, the Cutler corporation, and the Food Machinery Corporation, both severally and in confederation with each other, caused impairment and loss of the use and sale of Cook's invention; he prayed for an accounting from all of the defendants, asked for damages from them, and for an injunction against their manufacturing any grading machine of the same nature and for the same purpose as the Cook Grader, except such as were manufactured by the Cutler partnership on May 4, 1928. This bill is set out at large (pp. 2-17 of the record.)

The case was referred to a Master who found that appellee was not induced to enter into the contract of May 4, 1928, by any threat; that the Cutlers had no intention to undermine and destroy plaintiff's machine or suppress his invention. (R. 59); that the changes made in the Cook Grader were made in good faith to overcome defects; that the improved Cook Grader was not an inferior device but rendered equally as good results and avoided the defects in the original Cook Grader. (R. 59-60-61-2). No exception was taken to the Mas-

ter's findings upon these points. (See appellee's exceptions to Master's Report, R. 95-100, Court's Finding IX, R. 133, to which likewise no exception was taken.)

The Master further found that the Cutler partnership transferred the Cook contract to the Cutler corporation and when the Cutler corporation sold its assets to the Food Machinery Corporation the latter refused to take over the Cook contract unless the exclusive feature was eliminated but agreed that the Cutler division should handle only Cook Graders. Appellee refused to consent to the manufacture of his invention on any such terms and the Food Machinery Corporation thereupon refused to take over the Cook contract. (R. 63-4). No exception was taken to these findings. The Court also found that appellee declined to consent to any transfer of the contract to the Food Machinery Corporation unless the latter would manufacture the Cook Grader exclusively, that the Food Machinery Corporation was willing to take over the Cook contract, if the exclusive provisions were eliminated, with the understanding that the Cutler division would handle only Cook Graders, but refused to accept the contract if Cook insisted that all of the units of the Food Machinery Corporation should manufacture only Cook Graders. (Finding XI, R. 134-5).

The Master further found that after the sale to the Food Machinery Corporation the Cutler partnership and the Cutler corporation remained bound to carry out the contract of May 4, 1928, to which finding those

appellants excepted. (Exceptions I, II and III, R. 101-3). These exceptions were overruled by the Court (R. 108). The master further found that the period of the contract should be considered as terminated on October 1, 1931, since Cook had actual knowledge in 1930 that the Cutler partnership looked upon the contract as then terminated and refused to perform further in any respect then or in the future. (R. 83). To this finding appellee excepted (Plaintiff's exception I, R. 95-6).

The Master further found that the Cutler partnership and the Cutler corporation manufactured and sold during 1930 six Cook Graders out of the total sales by all manufacturers of twenty-six Graders; that the Cutler partnership and the Cutler corporation should have sold at least forty per cent of the sales; that the total sales by all manufacturers during that year represented but sixty per cent of the market which should have been 43 machines, of which forty per cent would be 17 machines; he gave no credit for the 6 machines actually sold, the royalties on which had already been paid, but allowed damages for 1930, consisting of royalties on 17 machines, at the rate of $50.00 each, that being the minimum royalty provided in the contract for machines of a length of 30 feet or over.

For 1931 the Master found that the total number of machines sold by all manufacturers was 20. He again assumed that this represented sixty per cent of the market so that 33 machines should have been sold during

that year, of which 40% or 13 should have been sold by the Cutler partnership and the Cutler corporation. He therefore allowed damages to the extent of $50.00 each for 13 machines. (R. 82-3).

To these findings of damages the Cutler partnership and the Cutler corporation excepted, on the ground that there was no evidence that the total number of machines sold by the whole trade in either year should have been any greater than the actual sales and that the forty per cent should be of the actual sales and not of any theoretically larger market. (Exception IV, R. 103). The taking of an exception to the obvious oversight in failing to give credit for the 6 machines which were manufactured and sold during 1930, and for which royalties were paid to appellee, was overlooked. Attention is called to this item, however, and it will be of some importance if this Court determines, as did the Master, that damages should be allowed consisting of royalties on machines that should have been manufactured up to October 1, 1931, instead of on the basis adopted by the Court as shown in the next paragraph.

Both parties excepted to these findings of the Master on damages, and the Court although not so stating, expressly, eliminated all such damages, and in lieu thereof, allowed appellee the difference between the amount of royalties and commissions paid by the Cutler partnership and the Cutler corporation to appellee and $15,000.00 (R. 138), relying upon the provisions of Article Seventh of the contract (R. 127-8), although the suit

was started almost a year prior to the date (October 1, 1931) referred to in that article and no supplemental pleadings were filed.

The Master allowed the further sum of $5,000.00 damages against the Cutler partnership and the Cutler corporation for loss of good will and expense of re-establishing a market for the Cook Grader with the comment that he was not unaware that it "closely borders on speculation." (R. 83-4).

To this allowance of damages the Cutler partnership and the Cutler corporation excepted on the ground that there was no evidence from which any value could be placed upon the alleged good will or as to the amount of money necessary to rebuild it if lost; that the allowance of said amount was not based on the record but on speculation and conjecture; that appellee had ample notice of the disaffirmance of the contract in January, 1930, and ample opportunity to continue advertising and sales efforts. (Exception V, R. 104). This exception was overruled by the Court. (R. 108). The Court also allowed this sum in its Finding XVIII. (R. 138-9). The Cutler partnership and the Cutler corporation excepted to said finding when proposed (R. 112) and said exceptions were overruled. (R. 117).

The questions involved all arise on exceptions to the master's report and to the Court's findings and Conclusions of Law and are as follows:

1. Whether the Cutler partnership and the Cutler corporation, upon the transfer of the Cutler business,

except the Cook contract, to Food Machinery Corporation remained bound to continue performance of the Cook contract in view of the provisions of Paragraph Eleventh thereof, and further in view of the refusal of appellee Cook to permit the purchaser, Food Machinery Corporation, to continue manufacture of the Cook grader unless it would agree to breach its contract to manufacture Clear Graders and his refusal of its offer to manufacture exclusively Cook Graders at its Portland (Cutler) branch? (Exceptions I, II and III to Master's Report, R. 101-3).

2. If the foregoing question be answered in the affirmative, then were the Cutler partnership and the Cutler corporation required under Paragraph Seventh of the contract to pay to Cook the difference between the royalties and commissions paid to him up to October 1, 1931 and $15,000, in the absence of written notice of cancellation given on or about October 1, 1931, in view of the following admitted facts: during the negotiations for the sale to the Food Machinery Corporation the offer was made to Cook that the Food Machinery Corporation would manufacture and sell Cook Graders at the Portland (Cutler) plant to the exclusion of any competing grader, which offer Cook refused; in January, 1930, the Cutler partnership informed Cook that the partnership considered the contract terminated and refused to perform it further then or in the future; in March, 1930, a similar notification was given Cook by the Cutler corporation; in June, 1930, with Cook's knowledge, the transfer was made to

the Food Machinery Corporation, thereby disabling the Cutler partnership and the Cutler corporation from continuing performance of the Cook contract, except with the consent of Cook, which consent was withheld; Cook made no objection to the transfer from the Cutler partnership to the Cutler corporation, or to the transfer from the Cutler Corporation to Food Machinery Corporation until a month after the latter was completed, except his oral assertion of his right and intention to compel Food Machinery Corporation to manufacture Cook Graders exclusively; this suit praying for injunction against the manufacture of any grader, except the Cook grader, by any or all of the defendants, and for damages for breach of the contract was filed in December, 1930; on February 12, 1931, the Cutler partnership and the Cutler Corporation answered the bill of complaint, asserting the contract recognized their right to sell their business (R. 24), and that the contract was terminated by the sale and Cook's refusal to permit continued manufacture of the Cook Grader (Paragraphs XX and XXI of Answer, R. 33-4, R. 36, R. 40); no supplemental bill of complaint was filed; the master found that if the contract had been fully performed up to October 1, 1931, the additional royalties which could have been earned for Cook would have been $1500.00 (R. 82-3) which, added to the royalties and commissions paid to Cook, would amount to far less than $15,000.00; the only exception filed by plaintiff to this finding was to the royalties per machine, it being asserted the royalties which would have

been earned would have amounted to $3,000 which sum, added to the royalties and commissions previously paid Cook, again amounts to much less than $15,000.00.

This question arises on the Court's decision that Cook is entitled to the difference between $15,000 and the royalties and commissions paid him (R. 108); the Court's finding XVII (R. 138) and the objections of the defendants thereto (R. 111); the Court's Conclusion of Law I (R. 140-141), and the objection of the defendants thereto (R. 113) and the overruling of said objections. (R. 117).

3. Whether there was any evidence to support the Master's finding that Cook was damaged in the further sum of $5,000 for loss of good will and the expense of rebuilding demand for his invention (R. 84) which finding was adopted by the Court (R. 108) and incorporated in the Court's findings. (R. 139). This question arises on defendant's Exception V to the Master's Report (R. 104) which was overruled by the Court (R. 108); the adoption by the Court of this finding of the Master (R. 139), the objection of defendant thereto (R. 112) and the overruling of said objection. (R. 117).

4. Whether, if appelle is entitled to any damages, he should not be limited to damages for 1930 or at most until October 1, 1931, he having absolute notice in January, 1930, of the refusal of the Cutler partnership to proceed further and having taken no steps whatever to minimize his damage.

This question arises from Exception V of defendants to the Master's Report (R. 104), the overruling thereof by the Court (R. 108), Defendants' objections VII, VIII and IX (R. 112-113), to the Court's Finding XVIII (R. 138-9), and the overruling of said objections (R. 117).

5. Whether, in the accounting between the parties, the Master and the Court should have taken into account items claimed by appellee under a separate and distinct contract not referred to in the pleadings, thereby reducing the amount paid to appellee on the contract of May 4, 1928, on the theory that the Cutler partnership should have paid appellee more on this outside contract than it did.

This question arises on the finding of the Master (R. 85-6), that an oral contract was entered into between the parties making appellee the agent of the partnership in the Medford district during 1928, that the terms of the oral contract are in dispute, that the partnership allowed appellee all of the commissions they thought he was entitled to (R. 86), being the commissions on all orders "as to which they believed he was the inciting cause" (R. 86), that the Master found the oral contract to be one to pay Cook commissions on all sales in the district whether procured by Cook or not (R. 85-86), that the partnership should have paid appellee upon this outside oral contract $291.53 more than it did pay him (R. 88), that the Master thereby reduced the payments to appellee under the contract of May 4, 1928, by said sum.

This question arises on Defendants' Exception VI to the Master's Report (R. 104-5), the overruling of the exception (R. 108), the Court's Finding XVI (R. 137), Defendants' objection IV (R. 111), and the overruling of said objection (R. 117).

6. Whether instead of plaintiff being entitled to recover from any of the defendants the Cutler partnership and the Cutler corporation were entitled to recover $1166.72 overpaid to appellee.

This question arises on the third affirmative answer, (R. 38-41), to the bill of complaint, alleging the partnership and the corporation had overpaid appellee, the Master's finding that, after deducting the $291.53 referred to in the previous question, the Cutler partnership and Cutler corporation had paid appellee $875.19 more than he had earned in royalties and commissions, (R. 89-90), the Court's Findings XVI and XVII (R. 137-138), the Court's Conclusions of Law (R. 140-141) and defendants' objections to said Findings and Conclusions. (R. 111, 113).

ASSIGNMENT OF ERRORS

The decree of the District Court was erroneous in the following particulars:

(a). In that it is based upon a finding of the Master to which the following exception was taken by appellants Asa B. Cutler, Frank W. Cutler, and Cutler Manufacturing Company, Inc., and overruled by the Court:

"That the Master has at pages 22 and 23 of his report erroneously and incorrectly interpreted the contract of May 4, 1928, between plaintiff and defendants, F. W. Cutler and Asa B. Cutler, copy of which is attached to the answer of Asa B. Cutler and F. W. Cutler, and Cutler Manufacturing Company, Inc., a corporation, and has based his recommendation for a recovery against these excepting defendants upon said erroneous interpretation of said contract. The particular error in interpretation asserted by these defendants is that the Master interpreted section 11 of said contract as giving to the plaintiff his choice of three options:

1. In the event of a sale of the business of Asa B. Cutler and F. W. Cutler, a partnership, to make an agreement with the purchaser by which the purchaser assumed all of the obligations of said contract.

2. Notwithstanding such a sale, to require these excepting defendants to continue full performance of said contract, and

3. To cancel the contract in its entirety whereas these excepting defendants assert that said contract gave to plaintiff in the event of the sale of the business of Asa B. Cutler and Frank W. Cutler, a choice of two options only:

1. To agree, if he could, with the purchaser that the purchaser would assume all of the obligations of the contract, or

2. To cancel and determine the contract in its entirety except as to the part already performed.

In presenting this exception these excepting defendants will refer to the contract of May 4, 1928, and to the testimony of F. W. Cutler, pages 898-900 of the transcript of testimony transmitted to the Court by the Master." (R. 101-2). Assignment XII (R. 234).

(b) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"That the Master has at pages 23-29 of his report rejected the contention of these defendants that the provisions of Section 11, if construed as giving to plaintiff alone an option to cancel in the event of a sale of the business of Asa B. Cutler and F. W. Cutler, were void for lack of mutuality." (R. 102) Assignment XIII. (R. 234).

(c) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"The Master found at page 29 of his report that upon the sale of the business of Asa B. Cutler and F. W. Cutler to Cutler Manufacturing Company, Inc., the partners remained bound and plaintiff had a right to demand performance both by the partnership and by Cutler Manufacturing Company, Inc., whereas there was no testimony of any exercise by plaintiff of any option to which he was entitled under said contract of May 4, 1928." (R. 102-3). Assignment XIV. (R. 234).

(d) In that it is based on the report of the Master

to which the following exception was taken and overruled by the Court:

"In computing the damages against these excepting defendants the Master at pages 32-33 of his report assumed that, if these excepting defendants had continued full performance of said contract of May 4, 1928, during the years 1930 and 1931, they could have sold Cook graders to the extent of forty per cent of the total fruit graders sold by the whole manufacturing trade during those years, and that the total number of machines sold represented only sixty per cent of the market so that these excepting defendants could and would have sold not only forty per cent of all fruit graders actually sold by the whole trade but also forty per cent of a theoretically larger market presumably to be created by the efforts of these excepting defendants. These excepting defendants assert that there was no evidence that the total market would have been any greater, or the total number of machines sold by the whole trade any greater during 1930 and 1931 if these excepting defendants had continued in full performance of said contract of May 4, 1928." (R. 103-4). Assignment XV. (R. 235).

(e) In that it is based upon the report of the Master to which the following exception was taken and overruled by the Court:

"The Master has found in his report at pages 34 and 35, in computing damages against these excepting defendants, that the sum of $5,000.00 should be included

for loss of good will or prestige of the Cook Grader due to the cessation of advertisements and sales efforts by these excepting defendants. These excepting defendants assert that there was no evidence received from which any value could be placed upon this alleged good will, or as to the amount of money and time necessary to rebuild it, if it was in danger of loss, or was lost, and the allowance of said amount is based not on the record but upon speculation and conjecture. Moreover, the Master found at pages 33-34 of his report that the evidence clearly establishes that plaintiff had actual knowledge in 1930 that both the Cutlers, as individuals, and the Cutler Manufacturing Company, Inc., had disaffirmed the contract, and therefore had ample opportunity to protect the good will of his Cook Grader by advertisements and sales efforts of his own. The date of such disaffirmance was in January, 1930, as disclosed by the testimony of the plaintiff Cook at pages 563 and 565 of the transcript of testimony" (R. 104). Assignment XVI. (R. 235).

(f) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"The Master, in stating the account between the plaintiff and these excepting defendants, found at pages 36 and 37 that there was an oral contract outside and independent of the contract of May 4, 1928, that the plaintiff Cook should act as a general sales representative of defendants, Asa B. Cutler and F. W. Cutler in the Medford district, and at page 39 found that the

accounting submitted by Asa B. Cutler and F. W. Cutler on the hearing omitted numerous items of commissions earned by the plaintiff Cook outside of the contract involved in this suit, amounting to $291.53, and he allowed plaintiff Cook credit in the account for that sum. At page 36 of his report he found that in stating the account between the plaintiff Cook and defendants Asa B. Cutler and F. W. Cutler under the contract of May 4, 1928, involved in this suit, the Cutlers had also allowed Cook 'A commission on all orders as to which they believed he was the inciting cause.' These excepting defendants assert that whether or not Cook had an outside oral contract with Asa B. Cutler and F. W. Cutler, and whether Cook was fully paid under said outside contract, is immaterial in this suit, not being pleaded or relied on in the complaint, that the Master was powerless to make any finding as to whether the Cutlers had paid to Cook the full amount due under said outside contract, and that in stating the account between the parties under the contract of May 4, 1928, involved in this suit, the Master's inquiry as to the outside contract should have been limited to an inquiry as to what the Cutlers actually had allowed Cook under said outside contract, the balance of the payments to him being applicable to the contract of May 4, 1928, and not what the Cutlers should have allowed Cook." (R. 105). Assignment XVII. (R. 235).

(g) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"The Master recommended at page 40 of his report that plaintiff recover his costs against defendants, F. W. Cutler and Asa B. Cutler, as co-partners, and Cutler Manufacturing Company, Inc., whereas approximately two-thirds of all of the hearing before the Master consisted of the unsuccessful attempt of the plaintiff to prove the allegations of the complaint that there was a conspiracy on the part of all of the defendants to eliminate competition, that the defendants Cutler intended to undermine and destroy plaintiff's machine and business and suppress his products and to impair the efficiency of the machine so as to make it unsuitable for fruit grading, that the Cutlers coerced plaintiff into making the contract of May 4, 1928, by threats to interfere with plaintiff's trade, and nullify his patent rights, that the Cutlers, under the pretense of making improvements in the Cook Grader, made changes in it which did in fact decrease its efficiency and value in the trade, all of which issues were found against plaintiff by the Master and found to be wholly unsupported. With the elimination of the charges so unjustifiably and unnecessarily made the case would have been a simple one, requiring approximately one-third of the time which the Master was actually compelled to devote to the case, and this fact renders it inequitable to assess all the costs against these excepting defendants." (R. 106). Assignment XVIII. (R. 235).

(h) In that it is based partly on the following exception taken by appellee and sustained in part by the Court:

"1. The report is in error in that the Master has applied an incorrect interpretation of the contract of May 4, 1928 (see Exhibit I, attached to answer of F. W. Cutler and Asa B. Cutler), and in particular of paragraph Seventh of said contract.

2. The Master has construed the acts of the defendants F. W. Cutler and Asa B. Cutler in selling their business to Food Machinery Company, in 1930, as the equivalent of cancellation of said contract of May 4, 1928, under the provisions of paragraph Seventh thereof (Report, pp. 33, 34). Plaintiff asserts that the acts of said defendants in disposing of their business and ceasing to perform their obligations under the contract of May 4, 1928, did not constitute a cancellation within the meaning of said paragraph Seventh. As a consequence defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., on account of their breaches of the contract of May 4, 1928, are liable to plaintiff in an amount, based upon facts found by the Master shown in the following table:

(a) Difference between the sum of $15,000.00 and $9,501.19 royalties actually paid up to October 1, 1931, ($6,751.76 plus $2,749.43; Report, pp. 39, 40) payable on October 1, 1931, under terms of said paragraph Seventh.	$ 5,489.81
(b) General damages resulting from destruction of market for plaintiff's	

machine caused by failure of defendants to perform their obligation under the contract to produce and market plaintiff's machine, being the same element and in the same amount as determined by the Master (Report, pp. 34, 35) 5,000.00

(c) Estimated royalties on additional machines which would have been sold between October 1, 1931, and September 30, 1933, had defendants performed their obligations under the contract of May 4, 1928, (Estimated on basis used by Master, Report, p. 33. Thirty machines during the 2-year period, or 15 machines per year, at $100 average royalty per machine —See Exceptions II) 3,000.00

Total $13,498.81

3. The result of a correct interpretation of the contract, applying the facts as found by the Master, is that plaintiff is entitled to recover $13,498.81 instead of $5,520.81, recommended by the Master." (R. 95-6-7.) Assignments V, VII, XI. (R. 232, 233, 234).

The part of said exception sustained by the Court consisted in the allowance of the difference between the royalties and commissions paid by the Cutler partnership and the Cutler corporation to appellee, but the

amount allowed by the Court on this item was $7,035.38 instead of $5,489.81 as claimed in said exception.

The Court also sustained the allowance of $5,000.00 for loss of good will, being item (b) in said Exception I. (R. 108, 141).

(i) That the Court erred in finding, holding and deciding that under the contract of May 4, 1928, and particularly Paragraph Eleventh thereof that if the defendants Asa B. Cutler and Frank W. Cutler should sell their business, they, the said Asa B. Cutler and Frank W. Cutler, were obligated to continue to manufacture the Cook Grader, and on failure so to do it was a breach of said contract of May 4, 1928. (R. 231).

(j) That the Court erred in holding and deciding that Paragraph Eleventh of the contract of May 4, 1928 was a cumulative remedy made available to the plaintiff and did not prescribe the exclusive remedy open to the plaintiff in the event the defendants Asa B. Cutler and Frank W. Cutler should sell their business, and in not limiting the plaintiff to his right to cancellation of said contract and the taking back of all rights under said patent on the happening of the event of sale and the inability of the said plaintiff to persuade the said purchaser to manufacture the Cook Grader to the exclusion of any competing machine. (R. 231).

(k) That the Court erred in not holding and deciding that the parties had prescribed in their contract the exclusive rights of the said parties in the event of

the sale of the business by Asa B. Cutler and Frank W. Cutler. (R. 232).

(l) That the Court erred in holding that said contract, and particularly Paragraph Eleventh thereof, did not permit the defendants Asa B. Cutler and Frank W. Cutler to sell thier business without incurring a penalty as for the breach of said contract. (R. 232).

(m) That the Court erred in holding that under Paragraph 7 of said contract the parties contemplated that the royalties and commissions thereunder should at least equal the sum of $15,000.00 up to October 1, 1931, and measuring the damages of the plaintiff up to that point by the difference between the amount of royalties and commissions paid under said contract and the said sum of $15,000.00 (R. 232).

(n) That the Court erred in holding and deciding that because no notice was given by the defendants to the plaintiff on or about October 1, 1931, of the cancellation of said contract that said contract continued in effect until October 1, 1933. (R. 233).

(o) That the Court erred in holding and deciding that the general damages sustained by the plaintiff until October 1, 1933, amounted to the sum of $5,000.00. (R. 233).

(p) That the Court erred in failing to hold and decide that there was no evidence to sustain any general damages and that the damages should have been limited, if any, to the amount of royalties which would

have been earned up to and including the first day of October, 1931. (R. 233).

(q) That the Court erred in not holding and deciding that by the commencement of said action prior to the 1st day of October, 1931, that said defendants elected to treat the sale of said business by the defendants Cutler and Cutler Manufacturing Company as a breach of said contract and that his damage was limited to actual damages consisting of the amount of royalties which he would have earned up to October 1, 1931. (R. 233).

(r) That the Court erred in holding and deciding that no notice of cancellation of said contract was given and that the commencement of said action was not a waiver on the part of the plaintiff of any written notice of such cancellation on and after October 1, 1931. (R. 234).

(s) That the Court erred in failing to find in favor of the defendants Asa B. Cutler and Frank W. Cutler and Cutler Manufacturing Company, Inc., on their counterclaim pleaded in their answer. (R. 235).

(t) That the Court erred in decreeing any right to issue execution against any property acquired by the Food Machinery Corporation from the other defendants in said cause in the event execution against the other defendants should be returned unsatisfied. (R. 235).

(u) That the Court erred in not decreeing that said contract of May 4, 1928, lacked mutuality in that it

recognized the right of the defendants Cutler to sell their business and as interpreted gave to the plaintiff an option to cancel the contract without any corresponding right on the part of the defendants Cutler. (R. 235-6).

(v) That the Court erred in not holding and deciding that the so-called agency contract of the plaintiff at Medford for the year 1928 did not give the plaintiff the right to a commission on all sales in the Medford district during said year, but gave to the plaintiff only the right to a commission upon sales made or induced by the plaintiff. (R. 236).

(w) That the Court erred in not decreeing the costs in this case in favor of the defendants and against the plaintiff, and particularly the Court erred in not decreeing costs in favor of the Food Machinery Corporation. (R. 236).

(x) That the Court erred in the event that the said decree should be affirmed in any particular in not decreeing to the defendants and against the plaintiff costs and disbursements, and particularly reporter's fees, and the cost of the transcript for the taking of all testimony on the issues decided in favor of the defendants. (R. 236).

ARGUMENT

I.

DID THE SALE BY THE CUTLER CORPORATION TO THE FOOD MACHINERY CORPORATION OF ALL OF THE CORPORATION ASSETS, EXCEPT THE COOK CONTRACT, THE PURCHASER NEITHER ACQUIRING THE COOK CONTRACT NOR AGREEING TO BE BOUND BY ITS TERMS, RENDER EITHER THE CUTLER PARTNERSHIP, OR THE CUTLER CORPORATION, OR BOTH, LIABLE TO PERFORM THE COOK CONTRACT FURTHER?

This question finds its answer in the interpretation to be placed on Paragraph Eleventh of the contract, reading as follows:

> "If during the term of this contract the company shall sell its business, the second party shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights hereunder and prevent any rights hereunder from passing to such purchaser from the company."

The interpretation which appellee claimed should be put on this paragraph is that it forbade any sale of the partnership business unless the purchaser was willing to assume and be bound by all of the provisions of the Cook contract and that the Cutler partnership and

the Cutler corporation breached the Cook contract when the corporation sold all of its assets, except the Cook contract, to the Food Machinery Corporation. The Master rejected this interpretation and no exception was taken thereto, so it is out of the case.

The Master construed the paragraph to mean that Cook had three options,—

a. To consent to the assignment to the purchaser on condition that the latter assumed all the obligations of the contract, and if the purchaser declined so to do Cook could,—

b. Insist that the Cutlers continue to porform; or

c. He could cancel and terminate the agreement.

To this decision of the Master the appellants excepted—Exceptions I, II and III. (R. 101-3). The basis of these exceptions was that there was no option given Cook by this paragraph to require the partnership, notwithstanding such sale, to continue performance of the contract. Therefore, both appellants and appellee are agreed that the purchaser of the balance of the business could not be compelled to perform the contract, and the only question is whether the partnership could be required to continue performance.

The circumstances leading up to the incorporation of this provision in the contract are important. During the negotiations the parties called upon the partnership's attorneys, but one of them was away, and the

other engaged in some work which prevented his then taking up the matter, and it was agreed that Cook's attorney should draw the contract. (R. 150, R. 161-2). Paragraph Eleventh was the last thing put into the contract. Cook says there was a conversation in which he demanded that some such clause be put in and then he went to his attorney who drew the paragraph and the contract was signed. (R. 162). He did not give the details of the conversation. Mr. F. W. Cutler, who conducted the negotiations for the partnership, said that in the conversation Cook said there was nothing in the contract about the partnership selling out to anybody and asked where he would be if they should sell out. He said further that his attorney thought there ought to be something in the contract about selling out. Cutler then told Cook the following:

"Well, now, it is all right with me, then, if you will have your attorney add a clause to the agreement we have now got that if you don't like any purchaser—anybody that we might sell our business to"—he brought that point up before, that he might not like the next fellow; he had confidence in us, but he might not like the purchaser—I said, "If you can't make a deal with the purchaser and don't like him, you can put a provision in the contract that you can take your rights back under the license, under your patent." (R. 154).

The contract was drawn up without any direct consultation between Cutler and Cook's attorney, except through Cook as an intermediate. (R. 156).

This paragraph, it will be observed, recognizes the right of the partnership to sell its business. The accomplishment of the sale was a condition precedent to the creation of any option in Cook. It must be assumed that the lawyer who drew the contract knew that the parties could not bind any third person not a party to it. It must be further assumed that, if the lawyer intended to draft a provision forbidding the sale of the business to any person who was unwilling to assume the Cook contract, he could and would have stated so clearly. What the lawyer clearly had in mind was that, if the purchaser was not willing to assume the contract, Cook could cancel it, and, if the purchaser was willing to assume it, Cook had the option of permitting him to do so or cancelling, if he did not like the purchaser or could not make a satisfactory deal with him. Unfortunately the lawyer who drew the contract died before the controversy arose.

In September, 1929, Cook was advised of the proposed sale and that the purchaser probably would not be willing to assume the Cook contract with its exclusive features unmodified, and he then insisted he would not permit the purchaser to manufacture the Cook machine if it continued to manufacture the Clear machine. (R. 160, R. 181-2). Later the purchaser offered to take over the contract and manufacture the Cook machine exclusively in the Portland (Cutler) plant, an offer which Cook refused. (Master's report, R. 63-4). In January, 1930, the purchaser, in view of Cook's attitude, definitely decided not to take over the Cook con-

tract, and Cook was so advised at that time. (R. 160, R. 148). In February, 1930, the partnership sold its business to the Cutler corporation and Cook was so advised by letter of April 5, 1930. (Plaintiff's Exhibit 12). He and his attorney had previously been advised (March 17, 1930) of the transfer, and of the intended transfer, to the Food Machinery Corporation. (R. 182). If Cook, or his attorney, had interpreted the contract as imposing any limitation on the right of the partnership to sell its business, he would undoubtedly have attempted to enjoin the transfer to the Food Machinery Corporation.

From the conversation which preceded the drafting of this paragraph it is apparent that the parties either assumed the contract was assignable without Cook's consent or else that the balance of the Cutler business could be sold and the contract retained by the Cutlers, in which event Paragraph IV of the contract, measuring the diligence to be used by the Cutlers in promoting sales by the diligence used by them in selling their other products, would excuse them from any diligence whatever, and Cook would be entitled neither to damages nor the right to retake control of his patent. It appears from the record that Cook had had some conversation with his attorney about the possibility of his patent being shelved by incorporation of the business and the transfer of the rest of the business to the corporation. Whichever understanding Cook had of his rights, without some paragraph providing for the contingency of a sale, he was quite clear in his mind that he wanted

the unrestricted right to cancel in the event of the sale of the Cutler business. The provision about requiring the purchaser to assume the contract was plainly the result of F. W. Cutler's suggestion that if Cook didn't like the purchaser, or, could not make a deal with him, then he could take back the license. (R. 153-4).

Paragraph Eleventh is by no means a model of clarity. It is ambiguous and might be construed in several ways. Therefore, the conversations preceding its drafting are important as an aid to its construction. With the aid of those conversations the meaning of the paragraph becomes clear.

First, it becomes clear that the reference to a sale of the business as though it were the unquestioned right of the partnership to sell resulted from the fact that none of the parties had any thought that any limitation was intended to be put upon the right to sell. Next it is apparent the parties intended that in the event of a sale Cook was to have the right to veto the transfer of the contract to the purchaser, if the purchaser was not satisfactory to him. Also, if he could not prevail upon the purchaser to take the contract in its entirety, he reserved the right to prevent the purchaser from getting any interest in the contract.

At the time of the sale Cook's attorney, who drew the contract, had died, and his new attorney apparently advised Cook that this paragraph gave him the right to compel the purchaser of the Cutler business to assume the burden of the contract and manufacture his

machine exclusively. Therefore, in July, 1930, Cook served notice on the purchaser, as well as the Cutler partnership, and the Cutler corporation, demanding that they all perform the contract. The same position was asserted throughout the trial before the Master, but, after the Master had filed his report rejecting Cook's contention in this respect, Cook employed new counsel and the contention was apparently abandoned. No exception was taken by appellee to the Master's ruling.

If it be conceded that the contract did not limit the right of the Cutlers to sell their business, then the Master's interpretation of Paragraph Eleventh as giving Cook an option to require the Cutlers to continue performance of the contract could hardly have been within the contemplation of the parties. Before the sale the Cutlers had an extensive manufacturing plant, after the sale they would have none. Before the sale they were engaged in manufacturing many other kinds of fruit machinery. After the sale they would be manufacturing nothing but Cook machines. The contract required them to use the same diligence in pushing the sales of Cook machines as they used for their other products—no more, no less. After the sale they would have no other products.

If the parties had intended that Cook should have the right to require the Cutlers to get a new plant there would of necessity be a substantial part of the contract period devoted to getting that new plant into opera-

tion. When it was in operation its product would be divorced from all of the other Cutler products through which the contract with the fruit business had been built up and was maintained. It is hardly likely that these contingencies would not have occurred to the contract parties and some provision would have been made about them. Therefore, it seems clear that the parties intended this clause to embody the oral understanding testified to by F. W. Cutler—that Cook should have the right, which he thought he would not otherwise have, to prevent assignment of the contract to any purchaser unsatisfactory to him, in which event he could exercise that right by cancellation.

II.

IN ANY EVENT THE CUTLERS DID NOT VIOLATE THE CONTRACT. INSTEAD, THEY OFFERED TO MANUFACTURE THE COOK GRADER EXCLUSIVELY AT THE PORTLAND PLANT.

ARGUMENT

The contract assumes the Cutlers had the right to sell their other business. The Master found they had the right to do so. No exception was taken to this finding. The Cutlers continued as officers of the purchaser to operate the Portland plant. They procured from the purchaser an offer to carry out the contract in full as far as the Portland plant was concerned, including the offer to manufacture the Cook Grader in that

plant to the exclusion of any competing grader. This offer naturally carried with it the offer to use the same diligence to market the Cook Grader that was used in marketing its other products. This offer was made to Cook and Cook definitely and unconditionally refused it and refused to permit continuance of the manufacture of Cook graders at the Portland plant, unless the purchaser would agree to the exclusive manufacture of it at all of the purchaser's plants. This offer remained open to Cook but he declined to accept it. (Master's Report, 63-4, Court's Finding XI (R. 134-5), Cutler's testimony (R. 160), Davies' testimony (R. 190, 192).)

If the Cutlers were bound to continue manufacture of the Cook Grader, as found by the Master, they would have to have some plant to do so. Before the sale they had no plant other than their Portland plant. After the sale they still had the power to devote the Portland plant to the manufacture of the Cook Grader. There is nothing in the contract which required the Cutlers to own the plant in which the Cook Graders were to be manufactured nor is there anything in the contract requiring them to perform the work of manufacturing with their own hands. Therefore, under the contract, the Cutlers had the right to do their manufacturing through such agent or agencies as they might desire, which would include the Portland plant although it would be owned by the purchaser. They offered the purchaser's consent that they do so and their own engagement as directors of the Portland plant to see that it was carried out. Obviously, the fact that they were

the owners of stock in the purchaser, or that one of them was a director of the purchaser, would not disable them from continuing to manufacture Cook Graders. The only thing which did disable them was Cook's positive refusal to permit them to proceed. How, therefore, can it be said that the Cutlers refused to carry out their obligation, if any obligation remained on them to manufacture and sell Cook Graders, when the only reason they did not continue to do so was that Cook forbade them to do it. If there was a repudiation of the contract, it was Cook's own repudiation which the Cutlers, after giving Cook every opportunity to change his mind, finally acquiesced in, thereby working a rescission of the contract by mutual consent.

III.

IF PARAGRAPH ELEVENTH GAVE TO COOK IN THE EVENT OF THE SALE THE THREE OPTIONS STATED BY THE MASTER, THEN THE CONTRACT LACKED MUTUALITY, AND THE CUTLERS HAD A RIGHT TO CANCEL IT.

POINTS AND AUTHORITIES

City of Pocatello v. Fidelity & Deposit Company of Maryland, 267 Fed. 181.

Miami Coca Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693.

Goodyear v. Koehler Sporting Goods Co., 143 N. Y. S. 1046, 116 N. E. 1047.

ARGUMENT

It is of course elementary that a contract which can be terminated at the will of one of the parties without liability for damages, as far as it remains executory, is not binding for want of mutuality. 6 R. C. L. 691.

This Court had before it a case on this point not unlike the present case.

CITY OF POCATELLO V. FIDELITY & DEPOSIT COMPANY OF MARYLAND, 267 Fed 181. Here the city let a contract for enlarging its water supply. The contract contained a paragraph, curiously enough marked Paragraph 11, providing that if "for any reason the City of Pocatello shall fail to make sale of and receive money for the $150,000.00 of water works bonds due to be sold on the 8th day of January, 1917, then in that event this contract at the option of the party of the second part (that is, the city) may be terminated without the party of the second part becoming liable in any manner or upon any account to the party of the first part upon any claim or demand whatsoever." The record was silent as to whether or not the bonds were sold on January 8, 1917, but the City on April 16th notified the contractor that he must proceed by the 19th of April, which the contractor refused to do unless an extension of time was given him for the carrying out of the contract. The city proceeded to construct the water works and sued the surety of the contractor on the contractor's bond for the difference in the cost to the city in constructing

the water works and the contract price in the contract with the contractor. In holding this contract void for lack of mutuality, this Court said:

> City of Pocatello vs. Fidelity & Deposit Co., 267 Fed. 182:
>
> "Under the contract the option of the city was conditional upon the failure to sell the bonds, and the city had the right to exercise the option of terminating the contract at any time. Had Mitchell proceeded with the work, he would have done so, knowing that the city could terminate the contract any time without liability to him in any manner, or upon any account, or upon any claim or demand that he might have had for work he had already done. There is no provision in the contract requiring the city to make an effort to sell its bonds, and no specification as to terms or conditions upon which sale of the bonds was to have been had. The purpose of the city, as made apparent by the language of article 11, was to reserve the right to terminate the contract, provided it did not dispose of its bonds, and in the exercise of such right, to escape any liability to any one upon any claim or demand whatever. A contract of such a nature could not be enforced; it lacks mutuality."

So in the present case the contract recognizes the right of the Cutlers to sell their business. In that event the purchaser not being a party to the contract was in no way required to be bound by it, was not required to take over the contract, or to execute it. It already was manufacturing a grader. Cook refused to allow his machine to be manufactured along with the manufacture of the other machine, but insisted upon the ex-

clusive manufacture of his own machine. He had the alternative, under his option, that if he could not require the purchaser to manufacture, to cancel. No one could compel him to permit the manufacture of his machine for any reason that he saw fit to refuse it. Not being a mutual obligation on both parties it lacked mutuality. Therefore, we submit that when the Cutlers sold their business there was no further enforcibility of the contract on the part of either party.

Miami Coca Cola Bottling Co. v. Orange Crush Company, 296 Fed. 693, the Circuit Court of Appeals of the Fifth Circuit held void for lack of mutuality a contract licensing to Miami Coca Cola Bottling Co. the exclusive right within a certain territory to manufacture and sell a certain drink with defendant's trade-mark. With reference to the facts in the case, the opinion says: (Page 693)

> "This is an appeal from an order dismissing appellant's bill, which seeks to enjoin the cancellation by the appellee of a contract and to compel its specific performance. The contract is in the form of a license, whereby the appellee grants to the appellant the exclusive right, within a designated territory to manufacture a certain drink called 'orange crush', and to bottle and distribute it in bottles under appellee's trade-mark. The appellee agreed, among other things, to supply its concentrate to be used in the manufacture of orange crush at stated prices, and to do certain advertising. The appellant agreed to purchase a specified quantity of the concentrate, to maintain a bottling plant, to solicit orders, and generally to undertake to promote the sale of orange crush, and to develop

an increase in the volume of sales. The license granted was perpetual, but contained a proviso to the effect that the appellant might at any time cancel the contract.

"The bill avers that the appellant bought a quantity of the concentrate, manufactured orange crush, and was engaged in the performance of its obligations, when, about a year after the contract was entered into, the appellee gave written notice that it would no longer be bound.

"(1-2) We agree with the District Judge that the contract was void for lack of mutuality. It may be conceded that the appellee is liable to the appellant for damages for the period during which the contract was performed; but for such damages the appellant has an adequate remedy at law. So far, however, as the contract remains executory, it is not binding, since it can be terminated at the will of one of the parties to it. The consideration was a promise for a promise. But the appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable." (Citing numerous cases.)

In this case it will be noted that the party to the contract, who was not according to the terms of the contract given the right to cancel, was the one who informed the party having the right to cancel that it would no longer be bound by the contract. In such case neither party is bound. So in the present case the contract recognized the right and possibility of the sale of the Cutler business, and that thereby the right of cancellation existed in one of the parties without any compensating obligation on his part. It lacks mutuality

as shown in the Pocatello case, second above quoted, where the city had the right of cancellation in the event it did not sell its bonds on a certain day.

Goodyear vs. H. J. Koehler Sporting Goods Co., 143 N. Y. S. 1046, 220 N. Y. 749, 116 N. E. 1047. The contract was held void for lack of mutuality, the syllabus of which case reads as follows:

> "A contract whereby plaintiff agreed to purchase from defendant a specified number of automobiles depositing money as part payment in advance on each automobile accepted, but in which defendant nowhere agreed to sell and deliver them, but which gave it the option of delivery, subject to no penalty or damages on refusal to deliver, was void for want of mutuality and was not cured by the appointment of plaintiff as defendant's agent."

IV.

IF APPELLEE WAS ENTITLED TO ANY DAMAGES FROM THE CUTLER PARTNERSHIP AND THE CUTLER CORPORATION IT COULD ONLY BE ROYALTIES WHICH WOULD HAVE BEEN EARNED UP TO OCTOBER 1, 1931, IF THE CONTRACT HAD BEEN FULLY PERFORMED TO THAT DATE.

STATEMENT

Paragraph Seventh of the contract is as follows:

> "SEVENTH: In the event that the commissions for the year 1928 and royalties accruing hereunder to October 1, 1931, do not equal or exceed the sum of $15,000.00, then the company on Octo-

ber 1, 1931, shall pay to the second party such sum as shall be necessary to bring the said total up to $15,000.00, provided that the company shall have the option to withhold payment of such deficit and cancel this contract by giving the second party notice in writing to that effect; and provided further that if the company shall not pay such deficit on or before October 1, 1931, then the second party shall have the right at his option to cancel this contract by giving 10 days' notice in writing to the company to that effect; and in the event this contract is so cancelled by either party as herein provided, then said second party shall have the right to manufacture and sell machines, equipment, devices, and attachments, described in said patent or reissue thereof, and all modifications, alterations and improvements thereof without any claims in favor of the company therein or thereto, as fully as if this agreement had not been made."

It will be observed that this paragraph refers to three different rights in the event the royalties and commissions did not equal $15,000 by October 1, 1931. First, the Cutlers could go on with the contract without Cook's consent by paying Cook the difference between $15,000 and the amount of royalties and commissions previously paid him. Second, the Cutlers could terminate the contract. Third, the Cutlers could refuse to pay the deficit and not cancel in which event Cook could cancel if he wished but still was not required to do so.

This paragraph is somewhat ambiguous but when construed in connection with the Eighth paragraph (R. 128-9) giving either party the right to cancel for any breach by the other party but only after 30 days notice and the opportunity to make good the breach it

seems clear that the foregoing interpretation of paragraph Seventh is correct. Any other interpretation of paragraph Seventh would make unnecessary the part of the paragraph giving Cook an objection to cancel on 10 days notice if the Cutlers failed to pay the deficit on or before October 1, 1931. Cook's right to cancel in the event of non-payment was absolute, there being no provision permitting the Cutlers during the running of the 10 day notice period to continue the contract by making the payment. It would seem therefore that the parties provided the remedy for a failure to pay the deficit and that remedy was and was only the giving to Cook of an option to cancel.

But whatever interpretation is given to this paragraph of the contract it is undisputed that in September, 1929, Cook knew of the proposed sale to Food Machinery Corporation in September, 1929, and that he refused to permit the purchaser to manufacture Cook Graders except to the exclusion of competing machines (R. 148, 160, 182); in January, 1930, F. W. Cutler notified Cook that they considered the contract terminated (R. 148, 160, 181). Cook was advised of the transfer from the Cutler partnership to the Cutler corporation by letter dated April 5, 1930, (R. 159; plaintiff's Exhibit 12) and orally on or about March 17, 1930 (R. 182); he made no protest at the transfer nor did he exercise, or attempt to exercise, any claim to option; Cook had knowledge of the proposed transfer to the Food Machinery Corporation before it occurred and the Master found he had actual knowledge that the Cut-

ler partnership and the Cutler corporation had disaffirmed the contract and "looked upon it as terminated; that they did not intend to and refused to further affirm it in any respect then or at any time in the future" (R. 83). There was no exception to this finding of the Master; Cook knew of the transfer to the Food Machinery Corporation at the time of its occurrence (June, 1930); he knew that among the things transferred was the Cutler plant.

In these circumstances it would seem clear that the rights of the parties became fixed; that if the action of the Cutlers constituted a breach of the contract the breach was complete and the duty was cast upon Cook to do whatever was necessary to minimize his damage. There is authority, to which we shall presently refer, to the effect that on repudiation of a contract the party not at fault may await the termination of the full contract period and then bring his action for damages but this rule if applicable to the peculiar facts of this case certainly gave no right to the present action for damages for a possible failure on the part of the Cutlers to exercise at a later date their right to cancel.

V.

IN THE ABSENCE OF A SUPPLEMENTAL BILL NO ADVANTAGE CAN BE CLAIMED OUT OF MATTERS ARISING AFTER THE SUIT WAS STARTED.

49 C. J. 567;

21 C. J. 540;

Equity Rule 34.

Equity Rule 19.

ARGUMENT

The bill was filed in December, 1930. The contract gave the Cutlers the option to cancel on October 1, 1931. No supplemental bill was filed. And yet the court treated the supposed failure of the Cutlers to exercise the right to cancel by notice given on or about October 1, 1931, as continuing the contract for the full five year period and creating an obligation on the Cutlers to pay Cook the difference between $15,000 and the amount of royalties and commissions which had been paid him prior to the filing of the bill.

It is, of course, elementary that the rights of parties are ordinarily to be determined by the state of facts existing at the commencement of the suit or action and that in the absence of supplemental pleadings all issues are to be determined as of that date. 49 C. J. 567; 21 C. J. 540; Equity Rule 34; Equity Rule 19; Doak vs. Hamilton, 15 Fed. (2) 774, 780. It seems to have been understood by Cook's counsel since he made no attempt

to ascertain from the witnesses whether any written notice had been given Cook by Cutlers of the termination of the contract. The only reference to this subject in the testimony, if it can be said to be a reference to it, was in a colloquy between the Master and F. W. Cutler not set out verbatim in the record, found at pages 995-996 of the transcript of testimony. The Master treated the contract as terminated October 1, 1931. New counsel for appellee excepted on the ground that there was no evidence of the exercise by the Cutlers of the option to terminate at that date and took the position whereby the Cutlers were required to pay the difference between $15,000 and the commissions and royalties already paid and to carry on the contract for the additional two years. This we believe was not permissible in the absence of a supplemental pleading.

VI.

IF THE BREACH, IF ANY, BY CUTLERS CAN BE CONSIDERED AS AN ANTICIPATORY BREACH THEN COOK HAD THE OPTIONS (1) TO CONSENT TO THE TERMINATION OF THE CONTRACT, (2) TO SUE AT ONCE FOR THE BREACH, OR (3) TO KEEP THE CONTRACT ALIVE AND SUE ON IT BUT ONLY AFTER THE END OF THE FULL CONTRACT PERIOD.

6 R. C. L. 1032, 1026;

13 C. J. 701, 653;

Krebs Hops Co. v. Livesley, 59 Ore. 574, 581-2;

Bu-Vi-Bar Petroleum Corp. v. Krow, 40 Fed. (2d), C. C. A. 10th Cir. 488.

ARGUMENT

The cases are not in harmony as to the rights of the injured party in case of repudiation of the contract by the other parties. Some cases reject the doctrine of anticipatory breach entirely. The great weight of authority, however, the Federal courts and the Oregon courts all adopt the rule stated in these texts:

> "It is well settled that, where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue one of three remedies: (1) He may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed; or (2) he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to

perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or (3) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing." 6 R. C. L. 1032.

"Where there has been a renunciation of an executory contract by one party, the other has a right to elect between the following remedies: (1) To rescind the contract and pursue the remedies based on such a recission. (2) To treat the contract as still binding and wait until the time arrives for its performance, and at such time to bring an action on the contract for breach. (3) To treat the renunciation as an immediate breach and sue at once for any damages which he may have sustained." 13 C. J. 653.

To the same effect are Bu-Vi-Bar Petroleum Corp. v. Krow, 40 Fed. (2d) 488, 69 A. L. R. 1295, and Krebs Hops Co. v. Livesley, 59 Ore. 574, 581-2.

The adoption of one option of course excludes the others. Cook elected in this case to bring suit at once asking for damages. Upon making this election "the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist except for the purpose of maintaining an action for the recovery of damages." 6 R. C. L. 1026. To the same effect is Lake Shore R. Co. v. Richards, 38 N. E. (Ill.) 773. Therefore, the rights of the parties were fixed by Cook's election to sue for damages and could not be altered by anything occurring thereafter and the rule of the least injurious consequences to the defendant

hereafter referred to applies. The damages allowable could therefore not be enhanced by any subsequent failure of the Cutlers to exercise the option to cancel the contract on October 1, 1931.

If the breach be considered not an anticipatory breach then the same result follows. If Cook is to be allowed damages as a result of his suit his rights to damages were immediately fixed and they were to damages only resulting directly from the breach of obligations which Cook had the right then to compel the Cutlers to perform although the performance might be in the future. His rights to damages could not go beyond the point where the Cutlers would have the right to cancel.

VII.

WHERE A CONTRACT IS BROKEN BY A PARTY HAVING AN ELECTION AS TO THE MANNER OF PERFORMANCE THE ALTERNATIVE WILL BE ADOPTED IN MEASURING DAMAGES WHICH IS LEAST INJURIOUS TO THE PARTY HAVING THE RIGHT TO EXERCISE THE CHOICE.

17 C. J. 847;

Custen v. Robison, 167 N. Y. S., 1013;

Holliday & Co. v. Highland Iron & Steel Co., 87 N. E. (Ind.) 249;

Branhill Realty Co. v. Montgomery Ward & Co., 60 Fed. (2d) 922;

Franklin Sugar Refining Co. v. Howell, 118 At. (Pa.) 109;

Kimball Bros. v. Deere, Wells & Co., 77 N. W. (Ia.) 1041.

ARGUMENT

This suit was brought almost one year prior to October 1, 1931. The contract provided for an alternative option in the defendants on October 1, 1931. The court has applied the option most injurious to defendants in arriving at damages. This seems to be in conflict with the general rule on the subject as disclosed in the following citations:

> 17 C. J. 847—"Where a contract is broken by a party having an election as to the manner of performance the alternative will be adopted in measuring damages, which is least injurious to the party having the right to exercise the choice."

Custen v. Robison, 167 N. Y. S. 1013. We quote the following from the opinion, which is self-explanatory:

> "The court did err, however, in stating that this contract was for a term of 2½ years. The contract provided that it was to commence April 1, 1915, and continue for 1½ years, and should be considered renewed for another year from the time that it expires, unless either party gave notice to the other party, in writing, at least two weeks before the expiration of the contract, that they intended not to renew it. The court held that, by reason of the failure of the defendants to give this notice in writing, the contract was automatically by its terms extended for the additional year. The defendants, however, breached the contract November 1, 1915, and refused to go forward with its performance, thereby giving the plaintiff notice not alone that they did not intend to extend it, but they did not intend to perform it until its expiration. There-

fore the amount of damages assessed by the jury for the last 12 months must be deducted."

Branhill Realty Co. v. Montgomery Ward & Co., 60 Fed. (2d) 922 (C. C. A. 2nd Cir.) We quote at 923:

"Assuming that mere payment of rent would not satisfy the lessee's obligation, that it was bound to occupy and make some use of the leased premises, it might, at its option, use them either for a chain store or for any other lawful purpose. Either use would have satisfied its obligation under the proposed lease. Where a promisor has agreed to alternate performances, in case of breach without an election, the damages are measured by the alternative that will result in the smallest recovery. Am. Law Institute Restatement of the Law of Contracts, Sec. 335; Hixon v. Hixon, 7 Humph. (Tenn.) 33; White v. Green, 19 Ky. (3 T. B. Mon.) 155; Franklin Sugar Refining Co. v. Howell, 274 Pa. 190, 118 A. 109, 115; W. J. Holliday & Co. v. Highland Iron & Steel Co., 43 Ind. App. 342, 87 N. E. 249, 253."

Holliday & Co. v. Highland Iron & Steel Co., 87 N. E. (Ind.) 349. We quote from 253:

"Where a contract is entered into between parties, giving to one of them an alternative, and the party having the right of such alternative breaches the contract, in estimating the measure of damages for a breach of such contract that alternative must be accepted which will be least injurious to the party having the right to exercise the choice. Sedgwick on Measure of Damages, Sec. 421."

Franklin Sugar Refining Co. v. Howell, 118 At. (Pa.) 109. We quote at 115:

"If a buyer is given an option to select goods of

differing qualities or prices, he may exercise the privilege within the limitations fixed by the contracts. Berg Co. v. Thomas & Son Co., 266 Pa. 584, 100 Atl. 951.

'When, however, no choice has been made, either expressly by the promisor, or automatically by the terms of the contract, or by law, the measure of damages for the breach of such a contract is the value of the alternative least onerous to the defendant.' 3 Williston on Contracts, 2498; 1 Sedgwick on Damages, Sec. 421; 17 Corpus Juris, 847; 35 Cyc. 600.

"This controlling principle has been thus stated in the leading case of Holliday & Co. v. Highland Iron & Steel Co., 43 Ind. App. 342, 87 N. E. 249:

'Where a contract is entered into between parties, giving to one of them an alternative violates the contract, in estimating the measure of damages for a breach of such contract that alternative must be accepted which will be least injurious to the party having a right to exercise the choice.'

"The same rule is recognized in Kimball Bros. v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041; Delker Co. v. Hess Spring & Axle Co., 138 Fed. 647, 71 C. C. A. 97; and by leading text writers."

"As already pointed out, the present agreement fixed a price based on barrels of granulated sugar, ordinarily containing 350 pounds, but an option was given to the buyer to designate other kinds, varying in price as well as in the quantity in the container. By the affidavit of defense, defendant could have selected barrels, the contents of which weighed as low as 240 pounds: hence, in the absence of some undisputed averment in the statement that the purchase was of granulated sugar alone, or that no other grade was available for de-

> livery at the time of the breach, defendant could not be charged, in entering judgment for want of a sufficient affidavit of defense, on any other basis than the one least burdensome to him."

Kimball Bros. v. Deere, Wells & Co., 77 N. W. 1041. The plaintiff, a manufacturer of scales, appointed defendant its agent for 5 years in certain territory. He agreed to take 150 sets of scales the first year and take 100 sets per year thereafter during the life of the contract. There were several different types of scales selling for different prices. After receiving 82 sets of scales the defendant agent refused to perform further. The agent claimed the contract was void for uncertainty because there was no way to know what price scales he would have taken had he performed. The trial court observed that the agent had the right to select the scales and therefore in fixing damages it would be assumed that he would have selected those in which the plaintiff would have realized the least profit. This holding was affirmed by the court with the observation that this rule made the contract to that extent definite and certain.

VIII.

THERE WAS NO EVIDENCE TO SUPPORT THE ALLOWANCE OF THE $5,000 ITEM OF DAMAGES.

ARGUMENT

The Master found that, in addition to the royalties and commissions which Cook would have earned if the

contract had been fully performed, Cook should be allowed $5,000 for loss of good will. He stated that it is important in marketing any device that the sales efforts and advertisements be continuous and that, if not continuous, time and money are necessary to re-establish the good will. He stated that he was "not unaware that the assessment of damages of such character closely borders on speculation", but was of the opinion allowance might properly be made. (R. 83-4).

Appellants excepted to this finding on the ground that there was no evidence to support it, that there was no evidence from which a value could be placed upon the good will or as to the amount of money or time necessary to rebuild it, and further that appellee had sufficient notice to have enabled him to protect this alleged good will himself (R. 104). The court overruled the objection and referred to this finding of the Master as one that general damages should be assessed (R. 108).

The court's findings on this subject go much further than the Referee. After reciting the necessity of continuous sales efforts to retain good will and the necessity of expenditure "of efforts to re-establish the market", the court further found that the facilities of the appellee to re-establish a market were less adequate than those of the Cutler corporation and Cutler partnership to maintain a market; that production ceased shortly after the discovery of operating defects in the Improved Cook and, by reason of these things and the failure of the defendants to perform the contract until October

1, 1933, plaintiff sustained general damages in the sum of $5,000 (Finding XVIII, R. 138-9). This finding was made over the objection of the appellants (R. 112).

There was no evidence as to the value of the good will of the Cook Grader. Its primary market, the Medford pear district, was already saturated and the sales in other markets of all of the various types of graders had shrunk to a very small figure in 1930 and 1931. The Master found the earnings which Cook should have received during 1930 and 1931 would amount to $1,500 only for the two years and to reach that sum he had to assume that the market for graders of all types should have been 40% higher than it actually was. It is a notorious fact that since 1931 the food industry has been in such a precarious condition that the market for graders would have been almost nil.

There was no evidence as to the cost of redeveloping a market or of the value of any efforts which might be necessary to accomplish that result. There was no evidence that Cook's opportunity to recreate a market was not as great as that of the Cutlers, especially so after the sale of the Cutler business. There was no evidence as to the probable demand for graders during 1932 and 1933. In short, there was no evidence whatever that we can glean from the record to form a basis for this allowance of $5,000.

In addition, whenever the contract was terminated, whether in 1930, on October 1, 1931, or September 30, 1933, Cook would of necessity be compelled to start his

own advertising and his own production or arrange with some one else to do so. He was put on notice in September, 1929, that the Food Machinery Corporation would not agree to manufacture his grader exclusively. He was given absolute notice in January, 1930, that the purchaser would not take over his contract on his terms and that the Cutlers considered the contract terminated. The Cutlers continued the manufacture of the parts on hand into Cook Graders under the right given them under the Tenth paragraph of the agreement to complete the machines then in the process of manufacture, and they continued to advertise the Cook Grader at least up to the final transfer to the Food Machinery Corporation, thereby covering a substantial part of the period when orders could be obtained. Cook had ample opportunity to start his own advertising campaign where the Cutler campaign left off, thereby maintaining such market as there was and, at least from January, 1930, ample opportunity to get into production. Under these circumstances it is submitted that there was no basis whatever for the allowance of $5,000.

IX.

IN COMPUTING THE PAYMENTS TO COOK UNDER THE CONTRACT THE MASTER AND THE COURT ERRONEOUSLY DEDUCTED THEREFROM $291.53 FOUND BY THE MASTER TO HAVE BEEN EARNED BY COOK UNDER A CONTRACT NOT INVOLVED IN THIS SUIT.

ARGUMENT

The Master found (R. 85-86) there was an oral agreement between the parties appointing Cook agent of the Cutlers in the Medford district for the year 1928; that the parties were in dispute as to whether this agreement entitled Cook to commissions on all of the Cutler machinery sold in the Medford district or only commissions on those sales which were procured by him. The Master found further that the Cutlers had allowed Cook commission on all orders "as to which they believed he was the inciting cause" (R. 86). The Master then said that while not entirely satisfied on the subject he found the oral contract to be as claimed by Cook—that Cook should be given a commission on all sales regardless of whether he secured the orders (R. 86). The Master then found that in addition to the amounts paid Cook under this outside oral contract the Cutlers should have paid him the further sum of $291.53, this covering items of commission where Cook had not secured the orders (R. 89). Thereby the Master reduced by that sum the payments which the Cutlers had made to Cook under the contract of May 4, 1928.

Exception was taken to this finding of the Master (R. 104-5). This exception was overruled by the court (R. 108) and the figures adopted by the Master as the amounts paid by the Cutlers to Cook under the contract of May 4, 1928, were adopted by the court (R. 138) over the objection of the defendants (R. 111).

The mere statement of the action of the court and

the Master demonstrates the error therein. The terms of the oral contract were not an issue in the case and no notice was given the Cutlers that it would be an issue. The Master found that in the accounting they allowed Cook what they thought he was entitled to under the oral contract. If they did not allow him enough, that was a breach of the oral contract and would confer a right of action upon Cook to recover the balance, but only in an action based on the oral contract and not in this suit relating exclusively to the contract of May 4, 1928.

X.

THE LOWER COURT SHOULD IN ITS DISCRETION HAVE APPORTIONED THE COST IN THIS CASE REQUIRING THE PLAINTIFF TO PAY FOR THAT PORTION OF THE RECORD UPON WHICH THE ISSUES WERE DECIDED AGAINST HIM.

ARGUMENT

The transcript of the testimony in this case consisted of 1106 pages. Defendants excepted to the decision of the Master assessing costs against the defendants on the ground that "approximately two-thirds of all of the hearings before the Master consisted of the unsuccessful attempt of the plaintiff to prove the allegations of the complaint that there was a conspiracy on the part of all of the defendants to eliminate competi-

tion; that the defendants Cutler intended to undermine and destroy the plaintiff's machine and business and suppress his products and to impair the efficiency of the machine so as to make it unsuitable for fruit grading, that the Cutlers coerced plaintiff into making the contract of May, 1928, by threats to interfere with plaintiff's trade and nullify his patent rights, that the Cutlers under the pretense of making improvements in the Cook Grader made changes in it which did in fact decrease its efficiency and value in the trade, all of which issues were found against the plaintiff by the Master and found to be wholly unsupported." (Exception VII, R. 106, Assignment of Error XVIII, R. 235.) An examination of the complaint, page 2, will show that the largest part of the allegations of the complaint were directed to the question of conspiracy, threats to undermine the plaintiff's business and to nullify his patent rights and to render his machine less valuable in the trade and to eliminate the machine from competition, and at least two-thirds of the 1106 pages of testimony and exhibits introduced were in an effort to sustain these allegations. This required the additional time of the Master, the additional time of counsel on both sides and of the reporter. All of these issues were decided by the Master and by the court against the plaintiff. In its final analysis, the case was reduced to practically the determination of whether or not the defendants had breached the licensed contract to manufacture and sell the patented article and the assessment of the damages,

f any, therefor. The cause could have been determined n the form to which it was in fact reduced by an action t law for the breach of the contract and all of the quities were decided against the complainant. The omplainant therefore very much increased the cost of he record, time of the Master and the expense of the itigation, and furthermore the issues which caused this ncreased expense were all decided in favor of the deendants and against the complainant. Under these cirumstances the court should have apportioned the costs n proportion to the increased amount caused by the llegations which plaintiff was unable to sustain. The ecord was voluminous and adjudged to the complainnt the sum of $667.38 costs, as well as the Master's ee and expenses of $1,275. It is the policy of the Equity Rules to prevent unnecessary proceedings, as or instance in assessment of costs for frivolous causes r delay, by filing improper exceptions (Rule 67, Equity Rules) and the allowance of costs to one party r the apportionment thereof has always been within the ound discretion of the court. We submit the unnecssary pleadings, the amount of time taken up and the xpense of taking the very voluminous testimony in he unsuccessful effort of complainant to prove the llegations of conspiracy, threats and purpose and inention of the defendants to eliminate the complainant's nachine should warrant the discretion of the court in preventing such practice by requiring the complainant o stand the costs of such part of the record, and that the

Master and the lower court abused its discretion in not charging such portion of the record to the complainant. The rule in equity is so well established that we deem it unnecessary to cite authorities. The rule is very simply stated under Section 5 of title "Costs" in 7 R. C. L. page 783, particularly statement on page 784: "And if it appears that it would be inequitable to compel the unsuccessful parties to pay costs, the court may, in the exercise of a sound judicial discretion, refuse costs to either party, may tax each party half the costs, or may impose the costs upon the prevailing party, as where the conduct of a party is unconscientious and oppressive, where complainant could have obtained the relief to which he is entitled without a resort to equity, or where both parties are in fault."

In addition to this the Food Machinery Company, which was in no way a party to the license contract, was haled into court and all issues were found in its favor and the only matter adjudged against it was that, in the event the judgment was not paid by the other defendants, execution might be issued against the property acquired by the Food Machinery Corporation from the defendants Cutler or the Cutler corporation. While not exactly a nominal party to the proceeding it was practically so and the rule with regard to costs under Rule 40 of the Rules of Practice in Equity should certainly be applied to it, that is, that it should be entitled to costs of all the proceedings against it unless the court shall otherwise direct. The Master and the lower court

under these circumstances refused even to grant costs against the complainant in favor of the Food Machinery Corporation.

Respectfully submitted,

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No. 7454

In the

United States Circuit Court of Appeals

For the Ninth Circuit

ASA B. CUTLER AND FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation

Appellants

vs.

FLOYD J. COOK

Appellee

Upon Appeal from the District Court of the United States for the District of Oregon

Brief of Appellee

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CONTENTS

AUTHORITIES CITED

AUTHORITIES CITED—Continued

No. 7454

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Brief of Appellee

STATEMENT OF THE CASE

This case is before the court on an appeal from a decree of the District Court of Oregon.

The case arose out of an alleged breach of a written contract dated May 4, 1928, made between appellee, as one party, and a partnership composed of appellants

Asa B. Cutler and F. W. Cutler, doing business under the name of Cutler Manufacturing Company, as the other party. The court determined that appellants breached the contract, and that appellee is entitled to recover from appellants, other than Food Machinery Corporation, the sum of $12,035.38, with certain rights to proceed against the property of the Food Corporation to satisfy the decree. (R. pp. 144-145).

A brief history of the transactions between the parties, to supplement the statement in appellants' brief, may be of assistance to the court.

Prior to 1928, appellee designed and obtained a patent on a device for grading fruit. (R. pp. 149, 196-197). The function of the device was to sort fruit according to size, to facilitate the packing and marketing of fruit of uniform size in each container. (R. pp. 194-196). Appellee, during the period from 1925 to 1928, developed the machine and sold several, particularly in the Medford district in Oregon, where the machines were used primarily for sorting pears. (R. p. 196). When appellee entered the field there was practically no use made of machines in sorting pears, and producers depended generally on hand sorting. (R. pp. 194-195).

Appellants Asa B. Cutler and F. W. Cutler had an established business in Portland, Oregon, of manufacture and distribution of various types of fruit machinery. (R. pp. 204-205). They operated as a partner-

ship under the name Cutler Manufacturing Company. (R. p. 204). In this brief, for the sake of brevity, the two appellants last named will be referred to as the "Cutlers" or the "Cutler partnership" to distinguish them from other appellants.

In April, 1928, appellee and the Cutlers negotiated a contract which was executed on May 4, 1928. (R. pp. 146, 149, 152). The present controversy arose out of that contract. Thereby the Cutlers undertook to manufacture and distribute Cook graders for a term to expire on September 30, 1933 (with certain cancellation privileges hereinafter discussed), and appellee granted them a license under his patent on a royalty basis. (R. p. 121).

Throughout the 1928 season the Cutlers produced and marketed a machine in all respects similar to that which appellee had theretofore produced. This machine is referred to in the record as the "Original Cook Grader". (R. pp. 201, 205, 207, 210). In that season the Cutlers discovered what they considered to be operating defects in the machine. To correct those faults and to adapt the machine to the grading and sorting of lemons, the Cutlers, late in 1928, altered the design and early in 1929 began to distribute what they termed the "Improved Cook Grader". (R. pp. 207-209).

Prior to September, 1929, overtures were made to the Cutlers to sell their entire business to John Bean

Manufacturing Company (which by change in name is the same corporation as appellant Food Machinery Corporation, herein referred to as "Food Corporation"). (R. pp. 173, 184, 188). In November, 1929, the Cutlers caused the incorporation of appellant Cutler Manufacturing Company, Inc., (herein referred to as the "Cutler corporation"). (R. pp. 174, 204). In February, 1930, the Cutlers assigned their partnership assets, including the Cook contract, to the Cutler corporation. (R. p. 204). Negotiations with the Bean Company culminated during the spring of 1930 in a contract for the sale of the Cutler business to the Bean Company. (R. pp. 176-177). On June 25, 1930, the Cutler corporation executed a bill of sale of its assets to appellant Food Corporation. (R. pp. 177-178). The Cutlers remained associated with the Food Corporation (R. pp. 177, 192), and their Portland business was thereafter conducted under the name "Cutler Manufacturing Company—Division Food Machinery Corporation". (R. pp. 187, 210).

The bill of sale to the Food Corporation expressly excluded the Cook contract. (R. pp. 177-178). Food Corporation declined to assume the Cook contract, because it was then making a competing machine, under a Clear patent (R. p. 179), and did not desire to be bound by the provisions of paragraph First of the Cook contract which forbade the manufacture and sale by the Cutlers of any grader other than the Cook. (R. pp. 190-192).

Early in 1930 the Cutlers and the Cutler corporation ceased all efforts to manufacture and sell Cook graders, except to assemble from parts then on hand some six machines. The last of the six machines was disposed of in September, 1930, and thereafter none of the appellants continued further to distribute Cook graders. (R. pp. 180, 213-215).

The damages awarded to appellee for the breach are made up as follows:

(a) The difference provided for by paragraph Seventh between $15,000 and $7,964.62, the amount actually paid to appellee for royalties and commissions under the contract of May 4, 1928,	$ 7,035.38
(b) General damages sustained by appellee by reason of breach by the Cutlers and the Cutler corporation,	5,000.00
Total,	$12,035.38

(R. pp. 141, 144).

Appellants have made twenty-five assignments of error (R. p. 231), but many of them merely raise in different form the same questions of law as are covered by others. The three principal points now pressed by appellants in argument include the interpretation of paragraphs Seventh and Eleventh of the contract of May 4, 1928, and the matter of the sufficiency of the evidence to sustain the court's finding of $5,000 general damages. There are two additional points, one the consideration to be given an item of

$291.53 in an accounting between the parties, and the other the allowance by the court of appellee's costs and the costs of the reference to the master in chancery.

Paragraph Eleventh relates to the rights of the parties in the event of a sale by the Cutlers of their business. Appellants contend that a proper construction of the paragraph requires the conclusion that the sale to Food Corporation terminated the contract. Appellee, on the other hand, asserts that the court was correct in the interpretation whereby appellee was entitled to insist on continued performance, so that the actual cessation was a breach.

Paragraph Seventh provides for termination of the Cutlers' obligation, under certain conditions, on October 1, 1931. Appellants assert that the court erred in taking into consideration when assessing damages the period between October 1, 1931, and September 30, 1933, the date of final termination of the contract. Appellee, on the contrary, asserts that the conditions precedent to the exercise by the Cutlers of that right to cancel were not fulfilled and that the measure of damages adopted by the court was correct.

The other points argued by appellants will be summarized in appropriate places in the argument which follows.

ARGUMENT

Appellants' argument, subdivided into ten numbered parts, covers five principal points, as follows:

A. The interpretation and effect given by the court to paragraph Eleventh of the contract of May 4, 1928, discussed in appellants' brief in subdivisions I, II and III, extending from page 32 to 46.

B. The interpretation and effect given by the court to paragraph Seventh of the contract, discussed in subdivisions IV, V, VI and VII, extending from page 46 to 58.

C. The contention that there is no evidence to support the court's finding of $5,000.00 general damages, discussed in subdivision VIII, at page 58.

D. The contention that the court improperly considered an item of $291.53, earned under an oral contract, discussed in subdivision IX, at page 61.

E. The contention that the court erred in failing to assess a portion of the costs against appellee, discussed in subdivision X, at page 63.

In appellee's argument which follows, the five points will be discussed in the same order.

A. The Interpretation and Effect of Paragraph Eleventh of the Contract of May 4, 1928.

1. Subdivision I of appellants' argument (p. 32) is devoted to a criticism of the interpretation given by the master to paragraph Eleventh of the contract. The master's interpretation (R. p. 71) was adopted

by the court in overruling (R. p. 108) appellants' exceptions thereto. (R. pp. 101-102).

The paragraph reads:

> "Eleventh: If during the term of this contract the company (the Cutler partnership) shall sell its business, the second party (appellee) shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights hereunder and prevent any rights hereunder from passing to such purchaser from the company." (R. p. 130).

It will be remembered that in the spring of 1930 the Cutler partnership sold their entire assets, including the Cook contract, to the Cutler corporation; and that the corporation in turn, sold its assets, excluding only the Cook contract, to Food Corporation by bill of sale dated June 25, 1930. The Food Corporation declined to accept an assignment of the Cook contract because of the provision therein that the manufacturer should distribute no grader other than the Cook grader.

In that situation the master and the court interpreted paragraph Eleventh to give appellee the right to elect between three courses:

(a) To consent to an assignment to a purchaser from the Cutlers, if the assignee agreed to assume all of the Cutlers' obligations under the contract; or

(b) Insist on continued performance by the Cutlers; or

(c) Cancel and terminate the contract.

Appellants argue that the language quoted did not give appellee the second right, namely, to insist on continued performance by the Cutlers, and since the Food Corporation declined to assume the contract, appellee's only right was to cancel the contract.

Counsel rely on the conversations preceding the signing of the contract to support the interpretation they urge. Counsel neglect to call to the court's attention the fact that appellee's objection to that evidence was sustained by the master, on the ground that it violated the parol evidence rule. (R. p. 155). The evidence was heard by the master subject to the objection and ruling. Counsel have cited no cases to support the admissibility of the evidence on which they now rely, and all of it might well be disregarded. However, it does not support appellants' present position, as we will show later, and the question of its admissibility is immaterial.

Counsel argue in effect, though not in terms, that the options given to appellee were exclusive and that in the event of a sale by the Cutlers, appellee's rights were limited to those therein stated. This argument is made in the face of the specific language which describes the rights as optional. Counsel have cited no authority to support their position; and, in particular,

have made no attempt to distinguish the cases of *Kant-Skore Piston Co. v. Sinclair Mfg. Corporation,* 32 Fed. (2nd) 882, (*certiorari* denied, 281 U. S. 735, 50 S. Ct. 249), and *Western Union Telegraph Co. v. Brown,* 253 U. S. 101, 40 S. Ct. 460, cited and relied on by the master in reaching his conclusions. (R. pp. 69-70).

Those cases are complete support for the court's conclusions and refute appellants' contentions. In *Western Union Telegraph Co. v. Brown* the court construed a contract for the sale of corporate stock. The vendors agreed to sell and the vendees agreed to buy certain stock for a stated price. Part of the purchase price was paid at once and the vendees promised to pay the balance at certain future dates. It was further provided that if the buyers should default in the payments, moneys theretofore paid should be forfeited to the vendors and "that thereupon all rights of each of the parties should forever cease and terminate." The court held that the contract was more than an option to the vendees to purchase. The obligation upon the vendees was absolute to pay the purchase price and the right of the vendors to terminate the contract was a provision inserted for the vendors' benefit "of which they might avail themselves at their election." The court quoted from *Stewart v. Griffith,* 217 U. S. 323, 30 S. Ct. 528, where with respect to facts similar to those here presented, the court said:

> " 'The condition plainly is for the benefit of the vendor and hardly less plainly for his bene-

> fit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word "void" means voidable at the vendor's election and the condition may be insisted upon or waived at his choice. *Insurance Co. v. Norton,* 96 U. S. 234; *Oakes v. Manufacturers' Insurance Co.,* 135 Mass. 248, 249; *Titus v. Glen Falls Insurance* Co., 81 N. Y. 410, 419.' "

The court in the *Western Union* case then proceeded:

> "The fact that the contract contains a privilege of ending it at the election of the vendor for nonpayment of the sum stipulated does not convert it into an option terminable by the purchasers at their will. *Stewart v. Griffith, supra.*"

In the *Kant-Skore Piston Co.* case, *supra,* the court considered a contract similar to that now before the court, wherein a patentee, as licensor, granted a license to manufacture under the patent. The contract provided that upon default in payment of royalties, the licensor could give notice to the licensee that the agreement and all rights thereunder would be cancelled in 60 days, and if, during the 60-day period, the payments were not made to cure the default, the agreement would "cease and determine" on the designated day. Construing the cancellation provisions, the court said:

> ". . . Clearly the provisions were inserted for the benefit of the licensor and not of the

> licensee; they were designed to give him additional rights in case of a breach. He had the option to give or not to give notice that the agreement 'shall be cancelled' at the expiration of 60 days; the licensees then had the right to avert the impending cancellation by repairing the breach. If it failed to do so within the specified period, what would be the result? The contract says 'then this agreement shall cease and determine'. Is the termination thereby made automatic or is it again at licensor's option? Licensee is the wrongdoer; it has failed to avail itself of the opportunity to repair the breach. *Unless the language compels the construction of automatic cancellation, thus giving the wrongdoer possible direct benefits, the clause will be held to confer a right only upon the other party, the licensor.* In our judgment its true meaning is that the licensor may end the agreement and the license but that, despite the notice, he need not avail himself of this additional right; he may treat the contract as continuing in full force and effect." (Italics ours).

These two cases, on their facts, are stronger than appellee needs to support the present decree. Therein the courts held that language inserted for the benefit of the vendor in one case, and of the licensor in the other, to cancel under certain circumstances, did not make the right of cancellation the exclusive remedy, but that the parties not in default could still insist on performance by the other parties. In the *Western Union* case the court reached the conclusion in the face of language that upon default by the vendor the rights of each of the parties should

"cease and terminate". The language was construed to give the vendor the right to elect either to terminate the contract or to insist on performance by the vendee. In the *Kant-Skore Piston Co.* case the language was that on default by the licensee, the contract should "cease and determine", and again the court held that it gave the licensor the right to elect.

In the present case the contract gave to appellee, upon the doing of certain acts by the Cutlers, the "option" to terminate the contract. Since the right to cancel was expressly made optional, the conclusion that the appellee had the right to refrain from cancellation, and to insist on performance, is more apparent than the corresponding rights under the contracts considered in the cases cited.

The language giving appellee the option to cancel, standing alone, shows that the provision was inserted for appellee's benefit. The evidence of the negotiations prior to the contract, on which counsel rely (and which was heard after the master ruled it was inadmissible), shows that the language was included at appellee's insistence, and that the language was for his benefit. Nothing in the conversations referred to indicates that the rights thus given to appellee were to be exclusive. The conversations show that the language was inserted for the very purpose of avoiding the consequences of a sale for which appellants now contend. The paragraph was inserted because of the

fear then expressed by appellee that without it the Cutlers could sell and thereby "shelve him". (R. p. 153).

Paragraph Eleventh merely gave appellee the right to elect either to cancel the contract, or to insist on continued performance by the Cutlers, his licensees. The master's conclusion, adopted by the court, is correct.

2. Beginning at page 39 in subdivision II of their brief, counsel make the rather surprising argument that the Cutlers did not breach the contract.

Counsel would admit of course that the Cutlers ceased to manufacture and distribute Cook graders in the spring of 1930. And counsel have pointed to no act of appellee which prevented the Cutlers from proceeding as the contract clearly contemplated to distribute Cook graders for the term therein specified.

But, counsel now argue, the Cutlers were not in default because appellee refused to consent to a modification of the contract so that the Food Corporation should have the privilege of manufacturing and selling Cook graders in the Portland plant purchased from the Cutlers, and at the same time manufacture and distribute a competing machine in another of its plants. In other words, counsel argue that although the contract in paragraph First provided:

> ". . . Said company (the Cutler partnership) during the said term will not manufacture any

> fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as are now being manufactured by the said company." (R. p. 122),

the Cutlers could force appellee to accept a modification, to the end that the Food Corporation, the Cutlers' assignee, could manufacture and distribute the Clear machine (R. p. 179), a competitor of the Cook, and still retain the benefit of the Cook contract so long as Food Corporation manufactured no grader other than the Cook at its recently acquired Portland plant.

The suggested modification would differ vastly from the contract as made. It is one thing for the Cutlers as an independent organization in Portland to manufacture and sell Cook graders in energetic competition with the Food Corporation selling the Clear machine; it is quite different for the Cutlers as directors or agents of the Food Corporation (R. pp. 31, 33) to sell Cook machines, manufactured by "Cutler Manufacturing Company, Division Food Machinery Corporation", while another branch factory of the same corporation manufactures and sells a competing machine. The first is what appellee contracted for. The second cannot be forced upon him.

If the Cutlers by their own act in disregard of appellee's rights, put it beyond their power to perform their obligations, it is no less a breach of their contract, and they cannot be heard to say that the

breach is the result of appellee's action, merely because appellee declines to accept something different from that for which he contracted.

Counsel, at the outset of their argument, state that "The contract assumes the Cutlers had the right to sell their other business". (p. 39). Certainly no such right is set forth in any portion of the contract other than paragraph Eleventh, the opening clause of which reads:

> "If during the term of this contract the company shall sell its business, . . ."

and, just as certainly, the language quoted did not confer a *right* to sell and repudiate the contract. It merely contemplated that the Cutlers had *power* to sell and might repudiate. But the recognition of a possibility of a sale is no more a grant of a right to sell than would the recognition of a possibility of any other default be a grant of a right to default.

In *Kant-Skore Piston Co. v. Sinclair Manufacturing Co., supra,* and *Western Union Telegraph Co. v. Brown, supra,* the contracts recognized the possibility of defaults by the promisors, and granted certain privileges to the promisees, depending on the occurrence of such defaults; but no one would suggest that the promisors were thereby given the right to default. So here the designation of certain privileges to appellee, contingent upon a sale by the Cutlers of their business, is not a grant of a right to sell and repudiate the Cook contract.

Consequently the suggestion made by counsel that the default was on the part of appellee rather than by the Cutlers is without merit.

3. Beginning at page 41, in subdivision III of appellants' brief, counsel argue that if the lower court's interpretation of paragraph Eleventh is correct, as giving appellee the right to elect to insist on performance by the Cutlers or to cancel, the contract is void because it lacks mutuality. Counsel argue that since appellee had the right to cancel and since there was no corresponding right in the Cutlers, the contract was not mutual and is unenforceable.

In support of their argument counsel rely on *City of Pocatello v. Fidelity & Deposit Company of Maryland,* 267 Fed. 181, *Miami Coca-Cola Bottling Co. v. Orange Crush Co.,* 296 Fed. 693, and *Goodyear v. Koehler Sporting Goods Co.,* 143 N. Y. S. 1046 (Afd. 116 N. E. 1047). The principles applied in the three cases are essentially the same.

In the *Pocatello* case, a contractor agreed to construct a water supply system for the city. The contract provided that if for any reason the city failed to sell certain bonds the city could cancel the contract. The contractor refused to proceed and the city sued the surety on his bond. The court sustained the defendant's demurrer on the ground that the contract lacked mutuality and this court affirmed the judgment for defendant. The contract was nothing more nor less

than this: The contractor agreed to build, and the city agreed to pay him, but if for any reason the city wished to avoid the obligation to pay, it could refrain from selling the bonds, in which event it would not be obligated in any way. This court very properly held the contract void as lacking in mutuality. The city assumed no obligation whatsoever and could not enforce the contractor's promise.

In the present case the situation is different. By the contract appellee was obligated to permit the Cutlers to manufacture graders under his patent for the full five year term until September 30, 1933. If the Cutlers had desired to exercise their rights for the full term, no act of appellee could have prevented them from doing so. Not until the Cutlers, by their own act, created the situation wherein appellee had the right to cancel, could appellee deprive them of their rights to manufacture under the patent. Thus the Cutlers had it in their power to sell their business or to refrain from selling. If they desired to refrain from selling, no act of appellee could have deprived them of their right to manufacture Cook graders. Only in the event that they themselves, of their own volition, elected to sell, did the right exist in appellee to cancel. There was no lack of mutuality, because the only right in appellee to terminate arose out of an act of the Cutlers and the Cutler corporation.

The decisions in *Western Union Telegraph Co. v. Brown, supra,* and *Kant-Skore Piston Co. v. Sinclair*

Manufacturing Co., supra, are again in point. In each of those cases the promisee was given the right to cancel upon default by the promisor. No corresponding right was given in terms to the promisor. If the present contract is void for lack of mutuality, when appellee is given the right to cancel upon the occurrence of some act done by the Cutlers, then the contracts in the cases cited were void because the promisees had rights to cancel upon failure of the promisors to perform. If the argument of counsel is sound on this question of mutuality then every contract which reserves to one party a right to cancel upon the happening of some event beyond his control or upon the voluntary default by the other party is void for lack of mutuality. Of course, that extreme position is unsound.

In I *Williston on Contracts,* Sec. 140, p. 314, the author discusses the question of mutuality, and states, in part,

> "It is often stated as if it were a requisite in the formation of contracts, that there must be mutuality. This form of statement is likely to cause confusion and however limited is at best an unnecessary way of stating that there must be valid consideration. . . . The particular error which is traceable to the misleading use of the word mutuality as a requirement for the formation of contracts, is a tendency observable in some cases to hold a contract invalid because the obligation undertaken on one side is not commensurate with that undertaken on the other.

> *Especially where one party is given an option, not accorded to the other,* of discontinuing or extending performance or *of cancelling* or renewing the contract or of determining the extent of performance, *confusion has arisen. If the option goes so far as to render illusory the promise of the party given the option, there is indeed no valid consideration, and therefore no contract, but the mere fact that the option prevents the mutual promises from being coextensive does not prevent both promises from being binding according to their terms.''* (Italics ours).

In the cases relied on by counsel the promises were illusory and the courts properly held that there were no enforceable contracts. They have no application to the facts now before the court. Under the interpretation adopted by the lower court, the promises of appellee, as qualified by the grant to him of optional privileges, were good consideration for the undertakings of the Cutlers. The contract as thus interpreted has ''mutuality'' and is binding and enforceable.

B. The Interpretation and Effect of Paragraph Seventh of the Contract of May 4, 1928.

Paragraph Seventh of the contract, the interpretation and effect of which is the subject of appellants' second main point, reads as follows:

> ''Seventh: In the event that the commissions for the year 1928 and royalties accruing hereunder to October 1, 1931, do not equal or exceed the sum of $15,000.00, then the company on

> October 1, 1931, shall pay to the second party such sum as shall be necessary to bring the said total up to $15,000.00, provided that the company shall have the option to withhold payment of such deficit and cancel this contract by giving the second party notice in writing to that effect; and provided further that if the company shall not pay such deficit on or before October 1, 1931, then the second party shall have the right at his option to cancel this contract by giving 10 days notice in writing to the company to that effect; and in the event this contract is so cancelled by either party as herein provided, then said second party shall have the right to manufacture and sell machines, equipment, devices, and attachments, described in said patent or reissue thereof, and all modifications, alterations and improvements thereof without any claims in favor of the company therein or thereto, as fully as if this agreement had not been made." (R. pp. 127-128).

In subdivisions IV, V, VI and VII, extending from page 46 to 58 of appellants' brief, counsel criticize the decree because it awards damages for the full period of the contract to September 30, 1933, by giving appellee the benefit of the provision of paragraph Seventh that if royalties and commissions accrued to October 1, 1931, "do not equal or exceed the sum of $15,000.00, then the company (the Cutler partnership) on October 1, 1931, shall pay to the second party (appellee) such sum as shall be necessary to bring the said total up to $15,000 . . ." Counsel argue that appellants are entitled to the benefit of the language in the provisos immediately following in the same sen-

tence, and that thereby appellee's right to damages must be measured by royalties and commissions which would have accrued only to October 1, 1931, had appellants performed continuously until that date.

1. Counsel contend in subdivision IV (pp. 47-49) that by the language of the paragraph, the Cutlers had three alternative rights: (a) to perform after October 1, 1931, by paying the difference between $15,000.00 and royalties and commissions theretofore paid; or (b) to terminate the contract; or (c) *"the Cutlers could refuse to pay the deficit and not cancel in which event Cook could cancel if he wished but still was not required to do so."*

Appellee recognizes, of course, that the Cutlers, if not otherwise in default, had the right to continue to perform beyond October 1, 1931, and until September 30, 1933, upon payment of the deficit to bring the total payments to $15,000. We would express it more positively. The Cutlers had the duty to continue until 1933, unless they were relieved therefrom by the occurrence of the conditions precedent upon which performance to 1933 was to be excused. In subsequent pages it will be shown that the conditions precedent were not performed, with the result that the obligation to continue to perform became absolute.

Appellee likewise admits the second alternative, that the Cutlers had the right to terminate under certain circumstances. Again, it will be developed in

later pages that the right originally vested in the Cutlers to terminate, was destroyed by their default in 1930, and by their failure to perform the conditions precedent to the exercise of that right.

Counsel are mistaken, however, in stating the third alternative that "the Cutlers could refuse to pay the deficit and not cancel in which event Cook could cancel if he wished but still was not required to do so."

The obligation to pay the deficit on October 1, 1931, was a positive obligation expressed in direct terms—"the company shall pay . . ." The proviso now under discussion gave to appellee the "option" to cancel, if the Cutlers defaulted in that direct obligation. True, it is an option which appellee might or might not elect to exercise; but it is a proviso inserted for appellee's benefit, and if he did not elect to cancel he could still hold the Cutlers to the performance of the direct obligation.

The point here involved is precisely the same as that discussed in previous pages relating to the various options available to appellee under paragraph Eleventh, providing for the contingency of a sale by the Cutlers of their business. Upon the authority of *Western Union Telegraph Co. v. Brown, supra,* and *Kant-Skore Piston Co. v. Sinclair Manufacturing Co., supra,* if appellee chose not to exercise his option to cancel for default by the Cutlers in failing to pay the deficit, he could exercise his alternative right to in-

sist on performance by the Cutlers of their direct promise to pay the deficit. The decree in this case, by using the $15,000 deficit provision as a measure of damages, merely recognizes appellee's right to enforce performance by the Cutlers.

The provisions of paragraph Eighth, referred to by counsel (p. 47), do not require a different conclusion. Therein the contract provides generally for the right in either party to cancel if a default by the other is not cured within thirty days after notice. (R. p. 128). The right in appellee under paragraph Seventh to cancel on 10 days' notice for a specified default does not give appellants the right to commit that default. It is not unusual to find in contracts different rights with respect to different types of default. In real estate mortgages, it is sometimes provided that the mortgagee may foreclose without notice for failure by the mortgagor to pay principal and interest, but that the right to foreclose for other defaults shall exist only if the default shall continue after the expiration of a certain time and notice to the mortgagor. Provisions of that type do not give the mortgagor any rights to default, but merely prescribe different remedies for different types of default.

In later pages we will discuss the effect to be given to the facts recited by counsel (p. 48) relating to the extent of appellee's knowledge of the intention of the Cutlers to repudiate.

2. The arguments in subdivisions V and VI (pp. 50-54) are closely related. Therein counsel urge, in effect, that since the present action was commenced in December, 1930, and prior to October 1, 1931, the date specified in paragraph Seventh for exercise by the Cutlers of their reserved right to cancel, the damages recoverable must necessarily be limited to those which would accrue to October 1, 1931. In any event, counsel argue, this must be true in the absence of a supplemental bill to allege the facts which transpired after the suit was started.

The fallacy in the argument lies in the assumption that appellants, the Cutlers and the Cutler corporation, at the time the suit was started, still retained the right to terminate the contract on October 1, 1931, and limit their obligation to performance only until that date.

If the contract had provided unconditionally that the Cutlers should perform until 1933, with no right under any circumstances to terminate the contract prior thereto, the authorities cited by counsel would support recovery of damages limited only by the obligation to perform until 1933. With that statement counsel cannot disagree.

It follows that if the contract required performance until 1933, with a provision that under certain circumstances the obligation should be limited to performance until 1931, then if by any means the alternative

right to suspend in 1931 was destroyed, the sole obligation remaining was to perform until 1933. After the alternative right to suspend was destroyed, it was precisely the same as though the contract as originally drawn imposed on the Cutlers the single and absolute obligation to perform until 1933. That, as we will show in the following pages, is the situation in this case.

The repudiation by the Cutlers occurred in the spring of 1930. By the act of repudiation they destroyed their rights to cancel the contract and limit their obligation to performance only until 1931. Thereby the obligation to perform for the full period to 1933 became the sole obligation. (See authorities cited, post). When this suit was started in December, 1930, the sole obligation of the defendants was to perform until 1933, and under the authorities cited by counsel, appellee had the right to sue forthwith to recover damages measured by a breach of the obligation to perform for the full term.

The court in using as a measure of damages the breach of the obligation to perform until 1933, merely gave effect to the right which appellee had when his bill was filed, depending only on circumstances as they existed at that time.

3. In subdivision VII, beginning at page 54, counsel argue that this case comes within the rule that where, by the terms of a contract, a promisor is given

the right to perform the contract by alternative methods and he repudiates the contract, he is liable only for damages measured by the alternative which is least onerous to him. Counsel assume that the Cutlers had the alternative to perform to 1933 or only until 1931. They argue, then, that the measure of damages upon repudiation must be the obligation to perform only until 1931, since that is less onerous than the obligation to perform until 1933. Consequently, they assert, the court erred in using the obligation to perform until 1933 as the measure of damages.

The argument which counsel make begs the question because it assumes that, in the circumstances here presented, appellants had alternative methods of performance available to them. The rule cited by counsel is not applicable unless such alternative rights actually existed.

The rule of damages applicable in the event of repudiation of a contract wherein the promisor has alternative methods, cannot be applied in a situation where the right to perform by alternative means does not exist. Even in the authorities relied on by counsel this axiomatic qualification of the general rule is specifically pointed out. In III *Williston on Contracts*, Sec. 1407, p. 2497, it is said:

> "A promise of one of several alternative performances will give the choice of alternatives, unless the contrary is stated, to the person who is to render the performance. This will ordi-

narily be the promisor, but may possibly be the promisee. It should be noticed that even where a choice of performances is given to the promisor, the obligation may be so expressed as to indicate that the primary duty relates to one of them, and that unless the promisor manifests an election to perform the other his duty is single. *And even under a true alternative contract the promisor's right of choice may be limited by a provision that the right to select one of the alternatives shall cease by a certain time or on a certain contingency.* In such a case after the lapse of the time within which one alternative might be chosen, the obligation becomes single and the measure of damages for breach thereafter is based upon the value of the remaining alternative." (Italics ours).

Illustrations of the foregoing principles come to mind readily. (a) First, let it be supposed that A, for valuable consideration from B, promises to deliver at a future date a horse or a cow. That is a true alternative contract, and in the event that A does neither, damages which B can recover are measured by the alternative least onerous to A, the promisor. (b) On the other hand, if A's promise is to deliver a horse on October 1st, provided that he may perform by delivery of a cow by September 1st, A's obligation is in the alternative until September 1st. But if that date passes without delivery of a cow, A's alternative right is gone and the single obligation remains to deliver the horse. If he fails to perform that obligation B's damages are then measured by A's single obligation to deliver the horse.

The case of *Branhill Realty Co., Inc., v. Montgomery Ward & Co.,* 60 Fed. (2d) 922, cited by counsel at page 56, involved a true alternative contract. The defendant therein promised to lease a building from the plaintiff and use it "either for a chain store or for any other lawful purposes". There was no condition precedent or subsequent to either of the alternative rights and the court held that upon defendant's breach plaintiff's damages should be measured by the obligation least onerous to the defendant, and, under the circumstances, that plaintiff's damages should not be measured by the highly specialized use of property for chain store purposes, but rather by the alternative obligation of defendant to use the property for any other lawful purposes. Similarly, the contracts before the courts in *Holliday & Co. v. Highland Iron & Steel Co.,* 43 Ind. App. 342, 87 N. E. 249, *Franklin Sugar Refining Co. v. Howell,* 274 Pa. 190, 118 Atl. 109, and *Kimball Bros. v. Deere Wells & Co.,* 108 Ia. 676, 77 N. W. 1041, cited by counsel at pages 56 to 58, were all true alternative contracts, in which the alternative obligations of the defendants were subject to no conditions precedent or subsequent.

Necessarily the authorities cited have no bearing in this case unless the present contract is a true alternative contract. The first question which must be asked in considering the point now under discussion is whether the contract of May 4, 1928, gave to the Cutlers the right of alternative performance and

whether, if the Cutlers had alternative rights in the first instance, such rights continued to exist.

The primary obligation of the Cutlers, expressed in the contract, was to manufacture and sell graders until September 30, 1933, and to pay, on October 1, 1931, such an amount that total payments for royalties and commissions to that date would equal $15,000. Then follows the proviso in paragraph Seventh that, under certain conditions, the Cutlers could withhold that deficit and cancel the contract. The contract clearly contemplated that the Cutlers should perform continuously until October 1, 1931, so that if they then desired to cancel and take advantage of the proviso, the Cook grader business could be turned back to appellee with the good will thereof unimpaired. And it was an express condition that the cancellation privilege, if exercised, was to be availed of "by giving the second party notice in writing to that effect". Without question the Cutlers in the first instance reserved to themselves the right to satisfy their obligations in one of two ways: Either by manufacturing for the full term, until September 30, 1933, or, *upon the occurrence of certain events,* only until October 1, 1931.

The question which must be answered is whether the conditions precedent, essential to the continued existence of the Cutlers' alternative right to terminate the contract in 1931, were performed. Appellee asserts that under the circumstances here presented the

alternative right to terminate in 1931 was destroyed, with the result that the single obligation to perform until 1933 continued, and that the court was correct in assessing damages based upon the value of the remaining alternative.

The Cutlers' right to terminate the contract on October 1, 1931, was lost to them for two reasons: (a) The condition precedent to the exercise of the right, the giving of a written notice, was not complied with; and (b) the repudiation of the contract in 1930 destroyed the right to cancel, because a party who is himself in default cannot avail himself of a reserved right to cancel. In the following pages the two reasons herein outlined will be discussed in turn.

(a) Where a contract reserves to one party the right to terminate the contract prior to the expiration date thereof, the conditions precedent to the right to terminate must be complied with. In paragraph Seventh it is specifically provided that appellants' right to cancel, if exercised, had to be availed of "by giving the second party notice in writing to that effect". No written notice was given.

The master rested his conclusion that appellants were obligated to perform only until October 1, 1931, upon the fact that when appellants repudiated the contract in 1930, appellee had actual knowledge that appellants did not intend to perform further. (R. p. 83). The conclusion of the master was overruled by

the court, and in doing so the court was clearly correct. Knowledge by appellee did not excuse non-performance of the condition expressly stated.

As said in *Black on Rescission and Cancellation,* (2d Ed.) Sec. 514:

> "Any provision in the contract in regard to the notice which must be given, as a condition upon the reserved right to cancel, *in respect to the form of the notice,* . . . must ordinarily be complied with strictly and punctually." (Italics ours).

The fact that a plaintiff may have knowledge of defendant's intention to exercise a reserved right to cancel is not sufficient to relieve the defendant of the obligation where the contract requires a written notice as a condition precedent to the right of defendants to cancel. *Star-Chronicle Publishing Co. v. United Press Associations,* 204 Fed. 217. And see: *Javierre v. Central Altagracia,* 217 U. S. 502; 30 S. Ct. 598; *Anvil Mining Co. v. Humble,* 153 U. S. 540; 14 S. Ct. 876; *Home Insurance Co. v. Hamilton,* 143 Mo. App. 237; 128 S. W. 273; *Leon v. Barnsdall Zinc Co.,* 309 Mo. 276; 274 S. W. 699; *Quereau v. Computing Scale Co.,* 133 N. Y. S. 501, (Afd. 103 N. E. 1131); *Ashland Coal & Coke Co. v. Hull Coal & Coke Corporation,* 67 W. Va. 503; 68 S. E. 124; *Ward v. American Health Food Co.,* 119 Wis. 12; 96 N. W. 388.

The only writings which were delivered to appellee bearing on the question of continued performance of

the contract by the appellants, or any of them, were two letters, one of April 5, 1930, and the other of June 30, 1930. Neither of the letters fulfills the requirement of paragraph Seventh of a "notice in writing" of cancellation by the Cutlers.

The letter of April 5, 1930, was addressed to appellee and was signed "Cutler Manufacturing Co., Inc., by A. B. Cutler, President". It reads as follows:

> "We desire to give you notice that the Cutler Manufacturing Company, Inc., has taken over the business and assets of the Cutler Manufacturing Company, copartnership." (R. p. 159).

That the letter did not constitute a written notice of cancellation of the contract of May 4, 1928, is too plain to require argument. And that the Cutlers did not at the time intend it as such is equally clear from the testimony of appellant F. W. Cutler, who stated:

> "This letter was written simply to advise Cook of our plans and what we were doing. It was my idea that Cook would have the right to cancel his contract if we sold out. . . . We had incorporated in this case here but we didn't intend to get out of the deal. The purpose of the letter was to tell Cook he would have the right, if he wanted, to cancel the contract. It was up to him. If he didn't cancel it the Cutler Manufacturing Co., I believe, would have to carry it along." (R. p. 159).

The other letter, that of June 30, 1930, was written by one of appellants' attorneys to the attorney then representing appellee. It reads in part as follows:

> "I am further authorized to advise you that the Cutler Manufacturing Co., Inc., has transferred its business to the Food Machinery Corporation. Mr. Cook was notified of the transfer of the business from the Cutler Manufacturing Co., a co-partnership, to the Cutler Manufacturing Co., Inc., but to date has exercised no option accorded him under the contract.
>
> "*Mr. Asa B. Cutler and Mr. F. W. Cutler consider that they have no further interest in the contract* except to finish up the material on hand as provided for in said contract, and they will send Mr. Cook a statement of royalties due him with check to cover within a few days." (Italics ours). (R. pp. 174-175).

In considering this letter the court must have in mind the rule that a notice given, as required by a contract, to relieve a party of his obligations must be clear and unequivocal. *Star-Chronicle Publishing Co. v. United Press Associations,* 204 Fed. 217; *R. H. White Co. v. Jerome H. Remick & Co.,* 198 Mass. 41, 84 N. E. 113; *Ford v. Dyer,* 148 Mo. 528, 49 S. W. 1091; *Austin v. Barley Motor Car Co.,* 233 Mich. 587, 207 N. W. 905; *Wright v. Bristol Patent Leather Co.,* 257 Pa. 552, 101 Atl. 844.

Under paragraph Seventh the Cutlers, in any event, were obligated to manufacture Cook graders at least until October 1, 1931. The only right of the Cutlers was to cancel by the required notice effective

not earlier than October 1, 1931. The letter of June 30, 1930, cannot be construed as a notice of cancellation to be effective on a date fifteen months later.

The letter informed appellee of the sale of the Cutler business to Food Corporation, and then proceeded to say that the Cutlers personally did not consider that they were under any further obligation under the contract. On that date the Cutlers had already breached the contract by cessation of their efforts to distribute Cook graders. The letter is at most an expression of opinion by appellants' attorney that the prior acts of the Cutlers were justified and that they had the legal right to terminate the contract at any time by a sale of their assets, and that upon such attempted termination the Cutlers were no longer liable under the contract. Our argument, in earlier pages, relating to paragraph Eleventh, shows that the attorney's opinion was erroneous.

The state of mind of the attorney when he dictated the letter is obvious. He realized that in no event could his clients be relieved of their obligation to perform for the full term without a written notice. He must have realized further that the cancellation could not be made effective earlier than October 1, 1931. He did not desire to be specific to cancel as of October 1, 1931, because that would have constituted a concession that his clients were already in default and were answerable for damages at least until October 1,

1931. To avoid this concession he wrote this letter in ambiguous terms, hoping perhaps that he might rely on it some time as a notice of cancellation. The letter was purposely ambiguous and equivocal and does not conform to the standard established by the authorities.

The letter was ineffective as written notice for a further reason: It said merely that the Cutlers personally "consider that they have no further interest in the contract". In this, the only language which could constitute the required written notice, no mention was made of the Cutler corporation. At that date the copartnership business had been transferred to the corporation, and appellee had been advised of that fact. Assignment of the Cook contract by the partners to the corporation could not release the individual assignors from their obligation unless Cook assented to such release by a novation. Appellee might well have been willing that the successor corporation should perform the obligations under the contract and manufacture and distribute the graders so long as the individual assignors remained bound. The notice that the individuals considered themselves relieved did not constitute notice that their assignee would no longer perform the contract. The quoted letter can well be read as an opinion of the attorney that the mere assignment to the corporation relieved the individual assignors of their personal obligations. That this is not the law is too clear to require citation of authority.

The letter of June 30, 1930, was not the clear and unequivocal written notice which the contract and the law required, and consequently it was ineffectual for that purpose.

Since there was no written notice of cancellation, as required by the contract, the condition precedent to the continued existence of the alternative right to terminate the contract on October 1, 1931, was not performed, and necessarily the alternative right ceased to exist, with the result that the obligation of the Cutlers and the Cutler corporation thereafter was measured solely by the single obligation to perform until 1933. One of the incidents of the obligation of continued performance was that appellants were unconditionally obligated to pay $15,000 on that date, less any amounts theretofore paid to appellee as royalties and commissions under the contract.

(b) There is a further reason why appellants' alternative right to cancel as of October 1, 1931, originally given them in paragraph Seventh, ceased to exist, leaving appellants with the single obligation to perform until October 1, 1933.

A party who is himself in default cannot avail himself of a privilege reserved in a contract to cancel it prior to the expiration of the term thereof. In the present case the contract, in any event, required faithful performance by appellants until October 1, 1931, but appellants breached the contract in the spring of

1930, and at that time ceased all efforts to perform their obligations. The authorities support the rule that faithful performance by the promisor is a condition precedent to the right to exercise a privilege of cancellation,—to be relieved of a burden more onerous to the promisor than if the contract is cancelled.

The general rule is stated in *Black on Rescission and Cancellation,* (2nd Ed.) Sec. 553, as follows:

> "The right to rescind a contract on the ground of failure of performance by the other party, delay in performance, want or failure of title, insufficient or incomplete performance, breach of conditions or of warranties, or for other such causes, *cannot be claimed by a party who is himself in default in the performance of any of the obligations imposed upon him by the contract.*" (Italics ours).

A specific application of the rule to facts similar to those here presented is made in *Home Insurance Co. v. Hamilton,* 143 Mo. App. 237, 128 S. W. 273. Plaintiff therein sued on a note given as part payment of a premium on a 5-year policy. Defendant had paid in cash one-fifth of the total premium. Defendant pleaded that he had cancelled the policy. It appeared that prior to the end of the first year defendant mailed the policy to plaintiff, with a request to cancel. The policy provided that the insured might cancel the policy if the premium were paid in full, in which event plaintiff would refund the premium on a short-rate basis. It was held that since defendant was in default

in that he had not paid the premium in full, the condition precedent to his right to cancel was not performed, and his attempt to cancel was ineffectual. Plaintiff was allowed to recover the full amount of the note. The court said:

> "A contract covering a certain period of time, but containing a conditional provision that it might be terminated before that time, will remain effective the full term, unless the condition of termination is fully complied with."

In *White Oak Fuel Co. v. Carter,* 257 Fed. 54, (*certiorari* denied, 250 U. S. 673, 40 S. Ct. 16), the court said:

> "The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of performance of an essential covenant thereof."

Again, in *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.,* 158 Calif. 264, 110 Pac. 951, where defendant, being sued for a breach, pleaded that it had cancelled the contract because of default by plaintiff, it was held that the attempted cancellation by defendant when defendant itself was in default, did not bar recovery by plaintiff because one who is himself in default has no right to cancel.

If a defendant in default has no right to cancel for default by plaintiff, it follows with greater force that he cannot exercise a right to cancel reserved in a contract. Otherwise a plaintiff, who is not in de-

fault but has, on the other hand, performed his obligations faithfully, would have lesser rights than a plaintiff who is in default himself.

For other authorities denying to a defendant the right to cancel when he himself is in default, see *Reddish v. Smith,* 10 Wash. 178, 38 Pac. 1003; *Mason v. Edward Thompson Co.,* 94 Minn. 472, 103 N. W. 507; *Gardner v. The Roycrofters,* 118 N. Y. S. 703, (Afd. 197 N. Y. 511, 90 N. E. 1158); *Norris v. Litchworth,* 167 Mo. App. 553, 152 S. W. 421, and *Griffin v. Griffin,* 163 Ill. 216, 45 N. E. 241.

Any cessation by appellants prior to October 1, 1931, of their efforts to distribute Cook graders would have constituted a default. Consequently, appellants, to be in good standing and to be entitled to exercise the privilege of cancellation as of that date, were required to perform continuously. Any cessation prior thereto, and, under the facts, the actual cessation in 1930, destroyed the right reserved to appellants to cancel as of 1931. Since the right was destroyed, any attempt or desire by appellants to cancel was ineffectual, however that intention was communicated to appellee.

The rule upon which appellants rely, that the measure of damages is that obligation least onerous to the defendant, is undoubtedly generally accepted, but the authorities do not extend it beyond rather narrow limits. The rule tends to give to one in default ad-

vantages arising from the very default. It is not the policy of the law to permit one to profit by his own wrong.

This tendency to restrict the rule is recognized by the authors of the text cited in *Franklin Sugar Refining Company v. Howell, supra,* the case from which appellants' counsel quote most extensively in support of the general rule. (p. 56). In that decision the court cited 1 *Sedgwick on Damages,* Sec. 421. In a subsequent section (1 *Sedgwick on Damages* (9th Ed.) Sec. 424a, p. 821) the authors say:

> ". . . . We seem to have, therefore, thus far in cases of alternative contracts which are not obnoxious to the law as involving penalties, two rules: first, the rule that where the defendant has an option to do one thing or another, if he fails to do one the law holds him to the other, and that this furnishes the measure of damages; second, the rule of the least beneficial alternative, *i. e.,* that where he has an option between two courses, since he might have chosen the one most beneficial to himself, that, in the event of the breach, furnishes the measure of damages. *Applications of the latter rule are certainly extremely rare, and there seems to be a very serious argument against its being ever applied except in the very unusual cases where the parties have expressly adopted it as the rule of their own contract.* The objection to it in all cases but these is that it gives to the defendant a double option. This was pointed out in Brooks v. Hubbard, (3 Conn. 58), where the court said that the adoption of the rule would give the defendant the benefit of the 'abnegated option'

> in another shape. In every ordinary case where the defendant is given an option to do one of two things, he contracts to exercise the option. Consequently, if he fails to exercise it, he has broken the contract in its entirety, and not merely committed a breach as to an alternative." (Italics ours).

In the first instance, by the terms of the contract the Cutlers had the right to elect to perform for the full term to October 1, 1933, or, under certain conditions, to perform only until October 1, 1931. Their alternative right to terminate on October 1, 1931, was lost because—

(a) The condition precedent to their right to suspend, the giving of a written notice, was not performed; and

(b) The default in 1930 destroyed the right to cancel.

Consequently the obligations ceased to be alternative, and, as Professor Williston says (*supra*):

> ". . . the obligation becomes single and the measure of damages for breach thereafter is based upon the value of the remaining alternative."

The rule relied on by appellants that the measure of damages is that least onerous to appellants is not applicable because the contractual obligations of the Cutlers were no longer in the alternative after their breach in 1930. Consequently the court did not err in using as a measure of damages the obligation to perform to 1933, with the corresponding obligation to

pay the amount prescribed in paragraph Seventh, the difference between $15,000 and the amounts theretofore paid under the contract for commissions and royalties.

C. Appellants' Contention That There Is No Evidence to Support the Court's Finding of $5,000 General Damages.

This is the subject of appellants' subdivision VII, beginning at page 58.

The master recommended that $5,000 be awarded for general damages which accrued during the period from appellants' breach of contract in 1930 to October 1, 1931. The findings of the court included damages in the same sum but for a longer period, that is, from the time of the breach until October 1, 1933.

The elements of damages covered by the master's findings are described by him in his report as follows:

> "There is, however, an additional element of damage which I believe should be considered. By reason of the failure of the licensees to perform, the Cook Grader has been taken from the market. Common experience, fortified by the provisions of the contract itself, indicates that the advertisements, developments and sales efforts of the licensees of the machine were essential to the successful performance of the contract. It is a matter of importance in marketing any device that the sales efforts and advertisements be continuous in order that the good-

> will of the business may be maintained and the purchasing public informed of the existence of the device, its merits and where it can be purchased. When sales efforts cease, the resultant damage is far greater than the loss of any individual sale, because it involves the destruction of the entire market, not only for the particular period but for the future, and requires the expenditure of much money and time to rebuild the demand for the device. I believe and find such resultant damage is substantial and real and that the innocent party should be made whole as far as may be possible. I am not unaware that the assessment of damages of such character closely borders on speculation, but I am of the opinion that an allowance may properly be made for it. I therefore find and allow the additional sum of $5,000 as such damages." (R. pp. 83-94).

Under the master's interpretation of the contract, the Cutlers and the Cutler corporation were not obligated in the circumstances to perform beyond October 1, 1931. In the nature of things, then, the master's award of $5,000 general damages included only those which had accrued up to that date. The trial court, on the other hand, held that the Cutlers and their assignee were obligated to perform for the full term to September 30, 1933. The court included the same amount for general damages, but specified that it should include damages accruing to October 1, 1933. (R. pp. 108, 139). Thus the finding of the trial court, allowing the same amount but for a longer period,

was more favorable to appellants than was the recommendation of the master.

The general rule applying to appeals in equity suits is that the appellate court will consider the entire record and is not bound by the findings and conclusions of the trial court. In applying the general rule there are certain principles uniformly followed relating to the weight to be given to the findings of a master in chancery and the findings and conclusions of the trial court.

The findings of a master in chancery, approved by the trial court, when before the appellate court, are considered as presumptively correct and will not be set aside except for manifest error in the consideration of the evidence, or in the application of the law. *Davis v. Schwartz,* 155 U. S. 631, 15 S. Ct. 237; *"The Chiquita",* 44 Fed. (2d) 302, (9th C. C. A.); *"The Tourist No. 2",* 64 Fed. (2d) 669, (9th C. C. A.). Necessarily then, if the finding of the trial court is more favorable to an appellant than was the finding of the master, the finding of the trial court will be accepted unless there is manifest error.

Likewise the cases establish the rule that where there is a conflict of testimony, the findings of a trial court, unless clearly erroneous, will be accepted by the appellate court. *United States v. McGowan,* 62 Fed. (2d) 955, (9th C. C. A.); *Easton v. Brant,* 19 Fed. (2d) 857, (9th C. C. A.); *Gila Water Co. v. In-*

ternational Finance Corporation, 13 Fed. (2d) 1. And the same rule is applied when appellant questions the sufficiency of the evidence, when there is any substantial evidence to support the finding. *McCullough v. Penn Mutual Life Insurance Co.,* 62 Fed. (2d) 831, (9th C. C. A.).

The court's findings contain no analysis of the mental processes by which the court fixed the amount. The master's report recites some, but probably not all, of the facts which were considered in arriving at his recommendation. It is not essential, of course, that we know precisely how the court and the master determined the award; and it is only necessary to show that there is substantial evidence to support the ultimate finding of fact. The question then is whether there is any substantial evidence to support the finding of general damages in the sum of $5,000. Appellee contends that not only is the evidence sufficient to support the award, but that the evidence would support an award in an amount substantially greater than that determined by the court.

Appellee entered the field with his device in 1925. (R. p. 196). Prior thereto there had been little use of machines for grading pears, and producers relied on hand sorting. (R. pp. 194-195). Appellee's device was well thought of by the trade. (R. pp. 197, 199-200). Appellee for the next three seasons supplied a constantly growing demand for machines for grading of pears in the Medford district of Oregon. (R. pp.

196-197). In the spring of 1928 he had what his banker described as a "successful business". (R. p. 197). He had plans for increasing his facilities and seeking a wider market, and had prospects for sales in other states. (R. p. 197).

The Cutlers were in the business of manufacturing and selling many types of fruit machinery, and had a world-wide distribution. (R. p. 205). Obviously the partnership could reach a much more extensive market than was open to appellee, with a young organization and with a "stock in trade" limited to the single device. The advantages of the Cutler manufacturing and marketing facilities for the full term of the contract were what appellee contracted for and was entitled to receive.

Further, the contract contemplated that the partnership should exert its efforts to distribute Cook graders continuously to October, 1931, at least, and thereafter until October 1, 1933, unless the Cutlers elected to cancel under the provisions of paragraph Seventh. The fruit machinery business is seasonal, reaching a peak in the summer months from June to August, and extending through the harvest season which ends, for pears, early in the fall. (R. pp. 206, 227). If the Cutlers had performed continuously until October 1, 1931, appellee would have had the benefit of the contract throughout the four seasons of 1928, 1929, 1930 and 1931. Then, if the contract had

been cancelled by the Cutlers, appellee would have had the full winter and spring of 1931-1932 to make other arrangements for distributing the grader during the 1932 fruit season. In those circumstances, the Cook grader might have been kept on the market as was the obvious intention of appellee. Similarly, if the partners had continued to October 1, 1933, without cancellation as the contract permitted, appellee would have had the opportunity to arrange for manufacture and sales in 1934 and subsequent years, and the device would not have been withdrawn from the market.

But the Cutlers did neither. On the contrary, they ceased to distribute Cook graders in the *spring* of 1930 (except to assemble and dispose of some six machines from parts then on hand). Appellants' own witnesses testified that preparations for business to be done in a particular fruit season had to be anticipated by preparations well in advance of actual sales. Parts had to be ordered and actual manufacture commenced well in advance of sales during the fruit season. (R. p. 206). The breach occurred at a time in the spring of 1930 so late that it was impossible to build up a manufacturing and sales organization to distribute the machines during the 1930 fruit season as effectively as could have been done by the Cutlers had they continued as the contract contemplated. Appellee could not personally take over the production and distribution on such short notice. His facilities for manufacture at Medford, operated prior to 1928

(R. p. 196), were for the manufacture of a wooden machine, the "original Cook grader". (R. pp. 201, 207). The Cook grader last distributed by appellants was the "Improved Cook", a machine constructed of steel with many parts substantially different in design from those used in the "original Cook". (R. pp. 207-208). It is a fair inference that a plant to machine and assemble steel parts must be much more extensive than one equipped to make and assemble wooden parts.

That an adequate sales organization is essential to the successful marketing of a product is obvious. Appellee had none in the spring of 1930; and that he could not then, in a period of two or three months, build one to compare with appellants' world-wide organization is likewise obvious. Probably the prodigal expenditure of unlimited funds could not even have accomplished the result; and it is certain that such a task could not have been accomplished short of the expenditure of several times the sum of $5,000, the item now under discussion.

The result was that the Cook grader was eliminated from the market for at least the 1930 season. It is well known that the cost and effort necessary to reestablish a device in a competitive market is much greater than the cost of maintaining that device in its established position in the market. It cost the Cutlers some $9,000 in a single year to develop and put the Improved Cook

grader on the market (R. p. 206), even though they had the existing good will of the Original Cook behind it, and a sales organization for their products generally. The Food Machinery Corporation "spent in the neighborhood of $15,000" to make a competing grader, the Clear machine, a commercial success. (R. p. 190). For the appellee to develop a plant and distribution system to make the Cook machine in seasons subsequent to 1930 would have cost much more than the $5,000 now under consideration.

There is another important factor. During the 1929 season users of the Improved Cook encountered difficulties because of the design of the troughs. (R. pp. 211-213). True, the Cutlers, at their own expense, altered the machines to correct the defects but the corrections were not made until the end of the 1929 season, and, in the spring of 1930, the Improved Cook, as corrected, had never been used through a fruit season. (R. pp. 212-213). It is undoubtedly true that the machine as thus changed was a good machine, but that fact had not been demonstrated in the field when appellants ceased to sell the machine in the spring of 1930. To suspend distribution when the practicability of the Improved Cook was an open question, was necessarily a serious blow to the good will attached to the product, and would have substantially increased the cost of reestablishing the machine in the market in later seasons.

Whether appellee had undertaken to reestablish the machine in the 1931 market (it was impossible to do so in 1930 because of the short interval between the appellants' breach and the beginning of the season), or in some later season, appellee would have had these development costs. By the terms of the contract, it was not contemplated that any such burden would be thrust on appellee. It was contemplated that appellants would perform continuously to October 1, 1933, or at least until October 1, 1931, and would surrender to appellee a device with good will unimpaired. In either event, appellee would have had nearly a year to prepare for the following season. If continuity of distribution had not been broken, appellee could have made the necessary arrangements for a subsequent season and much of the development cost, directly attributable to the manner and time of year when the breach was committed, would have been avoided.

The facts discussed in the preceding pages are ample support for the $5,000 item included in the court's award. In addition thereto, there are other facts which give further support to the court's finding.

As developed in other sections of this brief, the contract contemplated that, if the Cutlers did not cancel as of October 1, 1931, as they had a right to do under certain circumstances, they were obligated—

(a) To pay on that date the sum of $15,000.00, less amounts theretofore accrued and paid for royalties and commissions, and

(b) To continue to perform by manufacture and sale of Cook graders until September 30, 1933, with the corresponding obligation to pay royalties on machines sold subsequent to October 1, 1931.

The court's award includes $7,035.38 for the first of the two elements, and $5,000 for general damages, which accrued to October 1, 1933. (R. pp. 108, 139, 141). In addition, then, to the development costs hereinbefore discussed, the matter of royalties which would have been earned had the Cutlers continued to perform after October 1, 1931, was an element to be considered in fixing the amount of general damages. The record permits an estimate, within reasonable limits, of the royalties which would have accrued in the two-year period from October, 1931, to October, 1933.

From a careful analysis of defendants' Exhibit 10, summarized in the record at page 224, the master found that had the Cutlers not breached the contract in the spring of 1930, they could, by the exercise of reasonable efforts, have sold 17 machines in the 1930 season and 13 machines in the 1931 season. (R. pp. 80-83). The average royalties on machines actually sold before the breach in 1930 were as follows:

	No. Sold	Total Royalties	Average Royalty Per Machine
1. On sales from May 1, 1928, to April 30, 1929, principally of "Original Cooks" (R. p. 215)	34	$2,599.01	$ 76.44
2. On sales from May 1, 1929, to December 31, 1929, all "Improved Cooks" (R. p. 216)	16	1,598.85	99.93
3. On sales after January 1, 1930, to dispose of parts on hand, all "Improved Cooks" (R. p. 217)	6	809.16	134.86
4. Total all sales	56	$5,007.02	$ 89.41
5. Total of items 3 and 4 (to eliminate sales of "Original Cooks", and to confine average to sales of "Improved Cooks"	22	$2,407.91	$109.45

It is apparent from the foregoing tabulation that the Improved Cook was more expensive than the Original Cook and royalties thereon per machine were correspondingly higher. The best evidence of the royalties per machine which appellee would have earned if appellants had continued to sell after 1930, is item 5 of the foregoing table, $109.45, the average based on sales only of the Improved Cook. It is fair, then, to assume that the royalty would have been at least $100 per machine, for sales from October 1, 1931, to September 30, 1933.

The royalties actually accrued under the contract, considered with the estimates of sales as made by the master and estimates of average royalties as made herein, show the following experience:

	No. Sold	Royalty
1928 season (May 1, 1928, to April 30, 1929) (R. p. 215)	34	$2,599.01
1929 season (May 1, 1929, to December 31, 1929) (R. p. 216)	16	1,598.85
1930 season, estimated	17	1,700.00
1931 season, estimated	13	1,300.00
Average per season		$1,799.46

It is common knowledge that the increasing severity of the depression after 1931 would have had a tendency to reduce sales and resulting royalties in 1932 and 1933; and it is of course true that to the extent that the market for fruit graders approached the saturation point, future sales would decline. But there were factors present in the situation which support the conclusion that the 1931 experience, as estimated, might well have been expected to be repeated in 1932 and 1933.

The Cook grader was used first for grading pears. (R. p. 196). Not until the development of the Improved Cook in 1929 was it devoted to lemons. (R. pp. 207-211). In the spring of that year the Cutlers advertised that their machine had solved the lemon grading problem, with a labor saving of $25 to $30 per car over hand methods theretofore used. (R. p.

209). If that statement is true, and we must assume that it is when the question is whether the record is sufficient to support a finding against appellants, a saving of $25 per car on forty cars would pay the full price of a $1,000 machine. With the vast lemon industry as a market, there were undoubtedly many users who would have been anxious to purchase a machine which would pay for itself out of the savings on the first forty cars. The citrus industry is not restricted to the West Coast. There are also citrus districts in Texas and Florida. (R. p. 226). It is apparent that there was no saturation in the citrus industry and that there was a growing market for grading machines. Citrus Machinery Company sold no graders during the period from February 28, 1929, to March 29, 1930. It sold 4 between March 30 and June 25, 1930. Its distribution jumped to 25 for the period from June 26, 1930, to October 31, 1931. (R. p. 226). Manufacturers distributing competing pear graders maintained a constant distribution during 1929, 1930 and 1931. (R. p. 225).

From all these facts it is reasonable to conclude that had the Cutlers continued their efforts to sell Cook graders, suitable for both pears and lemons, they could have sold in each of the seasons of 1932 and 1933 at least as many as estimated by the master for 1931. On that basis we may assume that they would have sold 13 machines in each of the two seasons, a total of 26, and that the royalties which would

have accrued to appellee at $100 per machine would have been $2,600.

Considering the element of expense to appellee of reestablishing in the market a device which by appellants' breach was necessarily withdrawn from distribution for the 1930 season, and the sum of approximately $2,600 of royalties which appellee would have received after October 1, 1931, the court's determination of general damages in the sum of $5,000 is amply supported. This court cannot say that the finding is "clearly erroneous", and under the authorities cited above, the lower court's finding must be approved.

D. Appellants' Contention That the Lower Court Erred in Considering the Item of $291.53, Earned by Appellee Under an Oral Contract.

Beginning at page 61, counsel criticize what they consider to be an improper consideration by the court of the $291.53 determined by the master to have been earned by appellee for services of appellee under a certain oral contract other than the written contract of May 4, 1928. Counsel argue that the matter of the oral contract was not made an issue in the pleadings and hence should not be considered. Appellee asserts that it is necessary to consider the oral contract in order to arrive at a correct accounting between the parties as to their transactions under the written contract, that the matter of accounting under the written

contract and the damages sustained by appellee on account of the breach of the written contract were directly in issue under the pleadings, and that the history of transactions under the oral contract was material under the issues thus raised.

At the time of the making of the written contract of May 4, 1928, the parties thereto entered into an additional oral contract. The precise terms of this contract were in dispute. The Cutlers asserted that thereby appellee was to receive a commission on sales of Cutler products, other than Cook graders, in the Medford district in Oregon in 1928, but only where appellee was the inciting cause of the sales. (R. pp. 163-168). Appellee, on the other hand, asserted that he was to receive commissions on Cutler products sold, irrespective of how the orders were obtained. (R. pp. 169-171). On this conflicting evidence the master found, and the finding was sustained by the court, that the oral contract was as asserted by appellee. To that finding of fact the appellants do not except.

Appellants' witness Van Wyk presented a tabulation showing royalties and commissions paid to appellee, classified as between payments due under the written contract and under the oral contract (and in accordance with appellants' contention as to the nature of the oral contract (R. p. 216)), as follows:

	Under Written Contract	Under Oral Contract	Total
From June 5, 1928, to February 25, 1929....	$5,509.94	$1,245.04	$6,754.98
After February 26, 1929, to July 9, 1930.....	2,749.43		
Totals.....	$8,259.37	$1,245.04	$9,504.41

(See R. p. 218).

The master found that appellee should be credited with commissions under the oral contract in the sum of $291.53, in addition to those credited to him by Van Wyk under appellants' interpretation of the oral contract. (R. pp. 88, 91-94). In other words, the amount earned by appellee under the oral contract was $291.53 in excess of the $1,245.04 credited to him by Van Wyk, a total of $1,536.57. (R. p. 137). Counsel do not question the correctness of the amount as found, but merely question the application made by the court of that finding.

The total of $6,754.98 paid up to February 25, 1929, includes an item of $3.22 improperly charged to appellee (R. p. 219), so that the net total is $6,751.76. This is the total carried into the court's findings of fact. (R. p. 137). To determine what portion of that total is properly chargeable to royalties and commissions payable under the written contract, it is necessary to deduct $1,536.57, chargeable to the oral contract, to obtain the net total of $5,215.19 as found by the court. (R. p. 137).

This process of analysis is essential because when Cutlers made the payments to appellee going to make up the totals in the Van Wyk tabulation, the attempt was not made in every instance to specify whether the payments were made to apply on amounts due under the written contract or under the oral contract. Thus, on August 31, 1928, appellee received $1,000.00 on his general account with the Cutlers and there was no attempt then to allocate it to amounts due as between the written and oral contracts. (R. pp. 218, 220-221). Again, on December 24, 1928, a single check for $2,134.82 was delivered to appellee, which was not then allocated, but was only allocated between the two accounts by Van Wyk when he prepared his exhibit for the trial of this case. (R. p. 222). He then made the arbitrary allocation of $1,909.94 to amounts due under the written contract, and $224.88 to amounts due under the oral contract. (R. pp. 218, 222). Necessarily, since Van Wyk prepared the statement (R. p. 218) upon an erroneous understanding of the oral contract, he was in error in allocating only $224.88 to the oral contract, and should have credited the additional $291.53, now in question, to the oral contract as part of the December 24, 1928, payment.

In giving effect to the provisions of paragraph Seventh, and particularly to determine how far short of the $15,000 therein specified the actual payments fell, it is necessary to determine what portions of the moneys paid were chargeable to the written contract.

In making the calculation it is essential to determine what was earned and what should have been charged to the oral contract. That is all that the court did in its findings. (R. pp. 137, 138, 140-141). The court considered the $291.53 only for the purpose of determining the amounts paid under the written contract, a fact directly in issue under the pleadings.

Consequently there is no merit in appellants' contention that the court erred in considering the item of $291.53.

E. Appellants' Contentions With Respect to Costs.

The final subdivision of appellants' argument relates to costs. (p. 63).

The decree awarded to appellee his costs and disbursements to be recovered from the Cutlers and the Cutler corporation (R. p. 141), thereby approving the recommendation of the master (R. p. 90), and over the specific exception to that recommendation by the appellants named. (R. p. 106).

Counsel recognize that in equity cases the matter of the award of costs is within the discretion of the court (See *Kansas City Southern Railway Co. v. Guardian Trust Co.,* 281 U. S. 1, 50 S. Ct. 194), but contend that in this case the court abused its discretion.

A short answer to appellants' argument is that upon the record before the court on this appeal, this

court cannot determine whether the lower court abused its discretion. Counsel's argument is based upon assertions which the present record does not support.

Counsel state (p. 64) that " . . . at least two-thirds of the 1106 pages of testimony and exhibits were in an effort to sustain these allegations" of conspiracy contained in the complaint. To what page in the present record can counsel point to support the statement that there were 1106 pages of testimony? If that fact is true, where in this record is there any support for the statement that two-thirds thereof were devoted to the conspiracy issues (a statement which appellee stoutly denies)?

How much time was consumed by the master in consideration of the conspiracy issues, as distinguished from other issues? The record is silent. How many exhibits were offered, and of the exhibits offered, how many were material only on the conspiracy issue? The question cannot be answered from the present record.

It is apparent that the parties would disagree even though a full transcript of the proceedings before the master and the lower court were available to this court. Thus on the question of whether there is evidence to support the finding of general damages, counsel for appellants can find little evidence which is material. It is clear, then, that much of the evidence referred to in preceding pages, wherein we dis-

cuss the allowance of $5,000 for general damages, would be considered by counsel as material only to the conspiracy issue.

Upon the record now before the court it is impossible to conclude that the lower court abused its discretion in permitting appellee to recover his costs.

The final point argued (p. 66) is that the court erred in not allowing appellant Food Machinery Company to recover its costs from appellee.

By the decree, appellee has judgment only against the Cutlers and the Cutler corporation. The decree provides, however, that if the judgment is not paid, it may be satisfied out of property in the district of Oregon owned by appellant Food Machinery Corporation, acquired by it from the other appellants. (R. p. 144). Appellee is thus permitted to follow the Cutler assets into the hands of the Food Corporation.

If there is any error in the decree, it lies in the fact that appellee is not given a judgment directly against the Food Corporation. The record shows that the proposals that the Cutlers should transfer their business to John Bean Manufacturing Company later, by change of name, Food Machinery Corporation, were all made by the Bean Company. The Cutlers were reluctant to sell, and agreed to do so only after strenuous efforts by the Bean Company (R. pp. 184-186). The Food Corporation knew of the Cook contract as is evidenced by the serious con-

sideration by it of the question whether an assignment thereof should be accepted. (R. pp. 189-190). The Food Corporation induced the breach by the Cutlers upon which the present suit is based. One who induces a promisor to breach his contract with a promisee is liable to the promisee for damages arising from the breach. See *Husting Company v. Coca Cola Company,* 205 Wis. 356, 237 N. W. 85; *Sorenson v. Chevrolet Motor Company,* 171 Minn. 260, 214 N. W. 754, and the numerous cases cited in the annotation following these two cases in 84 A. L. R. 43. Under that rule appellee was entitled to a judgment direct against the Food Corporation.

Since the real error was a failure to give a direct judgment against the Food Corporation, it cannot be said that the court abused its discretion in declining to award to that appellant its costs against appellee.

It is respectfully submitted that all of appellants' assignments of error are without merit and that the decree appealed from should be in all respects affirmed.

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No. 7454

In the

United States Circuit Court of Appeals

For the Ninth Circuit

ASA B. CUTLER and FRANK W. CUTLER, co-partners, doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon Corporation, FOOD MACHINERY CORPORATION, a Delaware Corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon, for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

Appellants

vs.

FLOYD J. COOK

Appellee

Upon Appeal from the District Court of the United States for the District of Oregon.

Appellee's Petition for Rehearing

CAREY, HART, SPENCER AND MCCULLOCH
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FLETCHER ROCKWOOD
Attorneys for Appellee

No. 7454

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Appellants

vs.

FLOYD J. COOK

Appellee

Upon Appeal from the District Court of the United States for the District of Oregon.

Appellee's Petition for Rehearing

Floyd J. Cook, plaintiff and appellee herein, petitions this Honorable Court for a rehearing of this cause upon the following grounds:

The decision of this Court filed August 5, 1935, is erroneous because based upon an incorrect understanding of the evidence and the applicable decisions with respect to the contract dated May 4, 1928. The decision holds that the contract came to an end upon the sale of appellants' business to a third party, which sale occurred on March 29, 1930. In reaching this conclusion the Court apparently misunderstood the record in the following essential particulars:

1. The Court failed to take into account the essential surrounding circumstances and the real intention of the parties when the contract dated May 4, 1928, was made.

2. The Court, in holding that the parties intended that the contract dated May 4, 1928, was to be terminated upon the sale of appellants' business to a third party, seems to have misunderstood the real purpose of the contract.

3. Because of the matters specified under 1 and 2 above, the Court has failed to apply the two applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

CAREY, HART, SPENCER AND MCCULLOCH,
OMAR C. SPENCER,
FLETCHER ROCKWOOD,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

We, the undersigned, counsel for appellee in the above entitled cause, do hereby certify that in our judgment the foregoing petition for rehearing is well founded and that said petition is not interposed for delay.

OMAR C. SPENCER,
FLETCHER ROCKWOOD,
Counsel for Appellee.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

I.

Restatement of the Question Considered by the Court to be Controlling.

We present this petition for rehearing with a frank apology for the manner in which the question, considered by the Court in its decision to be controlling, was treated in appellee's brief. The disposition of the case required the interpretation of a written contract. In our brief we discussed this question of interpretation in quite an abstract manner, relying principally on two decisions of the Supreme Court of the United States which we thought were decisive. Apparently we relied too much upon the effect of these decisions and too little upon a detailed analysis of the contract and of the facts and circumstances showing the intention of the parties. Our confidence in the two decisions of the Supreme Court which we cited and thought controlling, which decisions had been accepted and followed by the Master in Chancery and by the District Court, was increased by the fact that appellants cited no authority to support the position urged in their brief. We have a strong conviction that our failure to discuss the facts in more detail with respect to the contract and the intention of the parties, has resulted in a decision which is erroneous and

which, if adhered to, will lead to grave injustice.

The decision rests solely on the interpretation of Paragraph 11 of the written contract dated May 4, 1928, between appellee and appellants, F. W. Cutler and A. B. Cutler, copartners doing business under the name of Cutler Manufacturing Company. By the contract, appellee granted to the Cutlers the exclusive license to manufacture fruit graders under appellee's patent. The Cutlers, in turn, promised to manufacture and promote the sales of appellee's device, and further, to refrain from manufacturing any competing machine. The contract was for a five-and-a-half year term, to expire on October 1, 1933, with provisions for termination upon the happening of certain events on October 1, 1931. The undisputed fact is that the Cutlers ceased to manufacture and distribute appellee's device in the spring of 1930. At that time appellee did nothing which could be construed as a consent to the release of the Cutlers from their obligation to perform for the full term stated in the contract. The Master and the District Court held that the cessation by the Cutlers in 1930 was a breach of contract and awarded damages to appellee accordingly. This Court has held that the suspension in the spring of 1930 was not a breach of contract on the part of the Cutlers and that consequently appellee was not entitled to recover damages from appellants.

Paragraph 11, upon which this Court based its conclusion, reads as follows:

> "Eleventh: If during the term of this contract the company (meaning appellants F. W. Cutler and A. B. Cutler as co-partners) shall sell its business, the second party (that is, the appellee) shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights hereunder and prevent any rights hereunder from passing to such purchaser from the company."

The facts are that the Cutler partnership (and its successor, Cutler Manufacturing Company, Inc.), in the spring of 1930, sold its entire business and its manufacturing plant in Portland, exclusive only of the contract with appellee, to appellant Food Machinery Corporation; that appellant Food Machinery Corporation was unwilling to accept an assignment from the Cutlers of the rights and obligations of the contract with appellee except upon a basis substantially different from the contract as drawn(that is, with the provision forbidding the manufacture of competing machines eliminated), and that appellee was not willing to accept performance by Food Machinery Corporation in a manner substantially different from that which he was entitled to receive from the Cutlers, with whom he had contracted. What then, in those circumstances, were appellee's rights?

The Master and the District Court, considering paragraph 11, held that appellee had the right (1) to insist on performance by the Cutlers, and if the Cutlers failed to perform, to recover damages for the breach; or (2) to make an agreement with the purchaser, Food Machinery Corporation, whereby the purchaser should continue to manufacture and distribute appellee's graders; or (3) to cancel and terminate the contract. This Court, construing the contract, held that appellee had only the last two alternatives, that the rights thus given in the last two alternatives were exclusive, and that appellee did not have the first alternative right, that is, to recover damages for failure by the Cutlers to perform the contract.

The Court, at page 4 of the pamphlet copy of the decision, states as follows:

> ". . . The primary question then is, did the defendants breach the contract by a sale of their business to the Food Manufacturing Corporation without a sale or assignment of the license contract?"

The Court, at page 6, uses this further language:

> ". . . While it is true that the contract did not expressly give the Cutlers a right to terminate the contract in the case of the sale of their business . . ."

The Court concludes that the sale by the Cutlers of their business and the suspension of performance by the Cutlers of the license contract was not a

breach of contract by the Cutlers, and thus reads into the contract a right in the Cutlers to terminate the contract by conduct entirely within their own control.

The right in a promisee to damages for failure of a promisor to perform his promise (in this case, the promise to manufacture and distribute Cook graders for the term specified in the contract) is a right which the law gives, and it is unnecessary to find an expression of that right in the contract itself. The effect of the decision, then, is that the Court, by interpretation, grants to appellants a right not expressed in the contract, and denies to appellee the right which the law allows, whether or not expressed in the contract.

The true intent of the contract, and particularly of paragraph 11, becomes apparent by consideration, first, of the rights of the parties if paragraph 11 had not been inserted in the contract, and, second, the circumstances and reasons for inclusion of the paragraph in the contract.

II.

Rights of the Parties If Paragraph 11 Had Not Been Inserted.

In the first place, if paragraph 11 had not been included in the contract, there can be no question but that upon sale by the Cutlers of their business

and suspension of the production and sale of appellee's device without appellee's consent, the Cutlers would have been answerable to appellee for damages.

The contract would have been merely this: Appellee granted an exclusive license to the Cutlers to manufacture under his patent, and the Cutlers promised to manufacture and distribute for the term specified. Unless the contract had contained a specific clause giving the Cutlers the right to terminate prior to the expiration of the term, the Cutlers would have been answerable to appellee in damages if for any reason they had failed to perform their promise. If paragraph 11 had been omitted, the Court would not have read into the contract (as it has actually done in its decision) a privilege in the Cutlers to terminate at their pleasure.

Secondly, even without paragraph 11, if the Cutlers had sold their plant to a third person and had attempted to assign the Cook contract to the purchaser, appellee could, of course, have made a new contract with the purchaser. If appellee had been satisfied to accept performance by the purchaser and to release the Cutlers, and if the purchaser had been willing to assume the Cutlers' obligations, the parties, of course, could have made a novation. That right in appellee to make a novation is the right in terms given to him in paragraph 11, under which he could

> "require that the purchaser from the company shall assume and discharge all the company's obligations hereunder."

As the decision of the Court points out, at page 6, the parties to the contract could not bind a purchaser in advance to assume the contract, and the right thus expressed in paragraph 11 was by its nature contingent upon the consent of the purchaser. So, too, if the paragraph had been omitted, the right to make a novation would have been contingent upon the consent of the purchaser. Consequently, the inclusion of the language in paragraph 11, next above quoted, gave appellee no right other than that which he would have had, had the paragraph been omitted.

In the third place, if paragraph 11 had not been included, and if the Cutlers had by their voluntary act sold their business and divested themselves of their means of performing the contract and had thereupon ceased to perform their promise, that would have constituted a repudiation by the promisor; and by the application of well established rules, appellee, the promisee, would thereby have been excused from further performance of obligations imposed on him, and could have treated the contract as terminated. This is particularly true in view of the language of paragraph 8 of the contract giving to either party the right "to cancel and terminate this agreement" upon breach of contract by the other party.

(R. p. 128). Thus, even without the specific grant by paragraph 11 of the right

> ". . . to cancel and terminate this agreement and put an end to all the company's rights . . ."

appellee would have had the right, in the circumstances assumed, to terminate the agreement. Likewise, in that situation, in the absence of a specific clause giving the Cutlers the right to assign the contract and compelling appellee to accept performance from whatever assignee the Cutlers might select, the appellee, without paragraph 11, had the power

> ". . . to prevent any rights hereunder from passing to such purchaser from the company."

It follows then that if paragraph 11 had not been inserted, the rights of appellee, in the event that the Cutlers had sold their business and by that voluntary act had divested themselves of the instrumentality essential to continued performance, and had thereupon ceased to perform, would have been as follows:

(1) He could have considered the contract as still in effect and could have sued and recovered damages for breach by the Cutlers; or
(2) He could have made a novation with the purchaser, if the purchaser was willing; or
(3) He could have treated the contract as cancelled and terminated for all purposes.

It is to be noticed that these three alternatives are the identical rights which appellee contends were

available to him with paragraph 11 in the contract. The Court recognizes that under that paragraph he had the second and third right, but denies to him the first.

III.

Rights of Appellee Under Paragraph 11.

The question then is whether, by the very inclusion of paragraph 11, appellee's rights were restricted, to eliminate (1) the right to treat the contract as still in effect and to recover damages, and to confine his right either to (2) the privilege of negotiating a novation, or (3) the privilege of cancelling the contract.

If the parties had so intended, there is no question but that, by specific language giving the Cutlers the right to terminate the contract in the event of a sale of their business, the parties could have granted to the Cutlers the right to terminate without liability to appellee, and by that means have barred appellee's right to damages in the event of sale by the Cutlers and cessation of performance. The Court has said that that was the intent of the contract; but to reach that conclusion the Court has been forced to read into the contract a provision not stated, and which the Court recognizes was not expressly stated, that is, a right in the Cutlers to terminate without liability. And in so doing, the Court, by the same

token, has been forced to strip the contract of the normal incident, uniformly allowed by law without express statement, that is, the right of a promisee to recover damages upon failure of the promisor to perform his promise. We respectfully submit that the Court, under the guise of interpretation, has altered the contract, and has drawn erroneous inferences with respect to the intent of the parties.

If the language of a contract is ambiguous, the court may consider parol evidence of the negotiations leading up to its execution, not for the purpose of varying its terms, but as an aid in its construction. (*Ryan v. Ohmer,* 244 Fed. 31; *E. H. Stanton Co. v. Rochester German Underwriters Agency,* 206 Fed. 978 (by Rudkin, J.); *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.,* 132 Fed. 957). We had not supposed that the language was ambiguous, when read in the light of the authorities we cited in our brief; but for present purposes, we will accept the statement of appellants' counsel, wherein, in referring to paragraph 11, they said:

> ". . . It is ambiguous and might be construed in several ways." (Appellants' Brief, p. 37).

Consequently we look to the parol evidence for assistance in its interpretation.

Paragraph 11 is the final paragraph of the contract as executed. (R. pp. 130-131). The agreement was dated May 4, 1928. (R. p. 121). The subject

matter of the paragraph was first discussed on May 3, after all other matters had apparently been agreed upon. The discussions which led up to this last minute insertion were related by appellant F. W. Cutler, as follows:

> ". . . On the morning of the 3rd he came to my office, much to my surprise, and said that he had discussed the proposed agreement with his attorney and a point had been called to his attention that he wanted to take up with me before he went on with the contract. Mr. Cook said 'There is no minimum provided, minimum royalty provided in the contract. You don't have to pay anything it you don't make sales, *and there is nothing in the contract about your selling out to anybody. Where would I be if you should sell out to somebody?*' I cannot give you exactly word for word the conversation, but what I have said is the substance of was (what) was said there. I recall distinctly Mr. Cook saying, 'Well, the way the contract is agreed on now *all you have to do is incorporate and you could get out of it and shelve me.*' I said, 'Well, Mr. Cook, if you have—in the first place, *I don't think we could get away with anything like that,* because it would appear to me to be collusion just simply to avoid the contract; *I don't think we could get away with it legally,* but in the second place, if you have any such lack of confidence in us as to think that we would try to *pull a thing like that* after making a deal with you, why, we better not deal at all.' 'Well,' he said, 'that is all right, but my attorney said we ought to have something in there about your selling out to somebody.' I attempted to dissuade Mr. Cook from going further with the negotiations, because

> it had been drawn out so long as it was I was getting to—being busy—to an end of patience in the matter in a way. *I didn't think it was necessary; I assured him that we had no intention of selling out, had no plans for such a thing,* but he still persisted in some clause that would give him what he thought he should have. I said, 'Well, now, it is all right with me, then, if you will have your attorney add a clause to the agreement we have now got that if you don't like any purchaser—anybody that we might sell our business to'—he brought that point up before, that he might not like the next fellow; he had confidence in us, but he might not like the purchaser—I said, 'If you can't make a deal with the purchaser and don't like him, you can put a provision in the contract that you can take your rights back under the license, under your patent.'" (Record, pp. 153-154.)

Mr. Cutler testified further:

> "The discussion, as I have already testified, was that we did not expect to sell out, but there was no discussion that there was a bar being planned for that contract." (Record, p. 155).

Based upon that discussion, and with the intent and purpose thus disclosed, paragraph 11 was prepared by the attorney selected by appellee and the contract as thus supplemented was executed.

The positive intent of appellee was to secure by paragraph 11 some protection and rights which he would not otherwise have had. Appellee had no purpose to give the Cutlers broader rights than they would otherwise have had; and the Cutlers were not

seeking any advantages in addition to those conferred by the contract without paragraph 11. Appellee wanted that clause for his own benefit. F. W. Cutler thought it was unnecessary because the Cutlers had "no intention of selling out", and Cutler believed that the Cutlers could not "get away with it legally" to sell and thereby "shelve" appellee, and indicated that appellee should not be so lacking in confidence in the Cutlers as to believe they "would try to pull a thing like that."

And yet the result of this Court's decision is to say that the paragraph, inserted for the very purpose of preventing the Cutlers from "shelving" appellee, indicates an intent by the parties to permit the Cutlers to do that very thing, that is, to sell the instrumentality essential to performance and to terminate the contract and release themselves without appellee's consent. Thus this paragraph, inserted for the purpose of protecting him in the enjoyment of his rights under the contract, under the decision of the Court conferred on the Cutlers the privilege to sell their plant whenever they chose, and, if appellee could not prevail on the purchaser to enter into a new contract by way of novation, to leave appellee without any remedy, that is, to "shelve" appellee.

It is error, we respectfully submit, to read into a particular clause, inserted for appellee's benefit for the purpose of broadening his rights, an intent to

restrict and cut down his rights, unless that result is inevitable. That result is not inevitable and the language of paragraph 11 does not compel the conclusion that the parties thereby intended that the Cutlers should have the right to terminate the contract at their pleasure, and that appellee should surrender his rights to damages in the event of sale by the Cutlers and their refusal to perform further. (See *Western Union Telegraph Company v. Brown*, 253 U. S. 101, 40 S. Ct. 460, cited in our opening brief, pp. 12-15, and discussed again in later pages).

Furthermore, the Cutlers, even after they had sold their business and suspended the manufacture and distribution of appellee's device, believed that they were still obligated to perform. Shortly before April 5, 1930, Cutler Manufacturing Co., Inc., had been formed and had succeeded to the partnership assets, including the Cook contract. On April 5, 1930, the Cutler Corporation wrote to appellee:

> "We desire to give you notice that the Cutler Manufacturing Company, Inc., has taken over the business and assets of the Cutler Manufacturing Company, co-partnership." (R. p. 159).

In explaining the purpose of that letter, appellant F. W. Cutler testified as follows:

> "It was my idea that Cook would have the right to cancel his contract if we sold out . . . We had incorporated in this case here but we didn't intend to get out of the deal. The purpose of the

> letter was to tell Cook he would have the right, if he wanted, to cancel the contract. It was up to him. If he didn't cancel it the Cutler Manufacturing Co., I believe, *would have to carry it along.*" (R. p. 159).

Again, in the face of this admission that appellants, as late as the spring of 1930, interpreted the contract as binding on them despite the fact of a sale of the Cutler business, the Court's decision reads into the contract a right in the Cutlers to terminate the contract, and finds as a fact that the parties intended that the Cutlers should have the right to terminate the contract at their pleasure, and thereby "shelve" appellee, by the simple device of disposing of the instrumentality essential to performance by the Cutlers.

The right which appellee asserts, is entirely consistent with the rights and powers (as distinguished from rights) which the Cutlers admittedly had under the contract. When the Cutlers had under consideration the matter of the sale to Food Machinery Corporation, the alternatives which faced them were as follows: If they wished to avoid liability for damages for breach of their contract with appellee, they could refrain from making the sale and proceed with the performance of the contract. On the contrary, if the benefit which they would receive from a sale to Food Machinery Corporation would be greater than

the detriment to them upon their liability to appellee, they could make the sale, pay appellee his damages, and still be in a more favorable position. The Cutlers had it within their power to choose between either of these two alternatives. The matter was entirely beyond the control of appellee. The mere fact that the parties recognized the power (as distinguished from right) in the Cutlers to sell their business and breach their contract, does not indicate any intention of the parties when the contract was made that the Cutlers could do so with impunity and without liability to the appellee for that breach.

The Court, at page 6 of the pamphlet copy of the decision, states:

> "The contract of May 4 is predicated upon the manufacturing plant of the Cutlers and upon their distribution of their manufactured products. It was obvious to the parties when they entered into a contract that when these facilities were sold to a third person, the Cutlers would be unable to carry out the contract in the manner contemplated by the parties at the time the contract was entered into."

The testimony of F. W. Cutler, quoted in earlier pages, shows that the possible sale to a third person was not the primary concern of the parties. Cook was seeking some protection, not primarily against the contingency of a sale to some outside party, but rather against the results of the incorporation of the business then conducted by the partnership. But even

though the primary concern of the parties was to protect appellee in the event of a sale to a third party, the conclusion of the Court, that appellee thereby intended to surrender any right which the law gave him in the event of a breach, is erroneous.

At pages 4 and 5 of the printed decision, the Court says:

> "The contract recognizes that such a sale of the manufacturing business would materially affect both parties to the contract. For that reason the subject is dealt with in the contract, although it was otherwise irrelevant. Is it a fair construction of clause 11 of the contract that in case the Cutlers sold their general manufacturing business to a third party they must erect a new plant and continue to exploit the plaintiff's machine? Clearly the parties contemplated no such extraordinary procedure in the event of such a sale."

It is undoubtedly true that the erection of a new manufacturing plant, in the event of a sale by the Cutlers of the existing plant, was never considered nor contemplated by the parties. But the Court's conclusion based upon that fact is unjustified. It does not follow that the parties intended by the language of paragraph 11 to restrict the rights and remedies of appellee. Even though the fact recited is true, it is likewise true that appellee intended to retain his right to recover damages if the Cutlers voluntarily chose to divest themselves of their means of performing the contract.

The Court, at page 6 of the pamphlet copy of the decision, says:

> ". . . it is manifest from the contract and the circumstances surrounding it, and particularly from the provisions of paragraph 11 thereof, that a sale by the Cutlers of their business would prevent their performance of the contract, and, consequently, to enforce the contract under the circumstances would be directly contrary to the obvious intention of the parties."

We respectfully submit that the conclusion of the Court from this premise does not follow. It may well be that the parties recognized that if the Cutlers divested themselves of their means of performing the contract, that is, if they sold their manufacturing plant, they would thereafter be unable to perform the contract according to its terms, but it does not follow that to enforce the contract by giving the appellee a right to damages is contrary to the intention of the parties as expressed in the contract.

The Court states further at page 6:

> ". . . It was also known that neither Cook nor the Cutlers could control the action of a third party who purchased the business of the Cutlers. Consequently, the first option to the plaintiff contained in paragraph 11 in the event of such a sale was evidently intended to give him the right to negotiate a satisfactory arrangement for the continuance of the manufacture of plaintiff's machine by the purchasers of the business of the Cutler brothers. In the event he was able to

> make such an arrangement the first option would have required Cutler brothers to transfer the license contract to the purchaser regardless of whether or not the Cutlers desired to continue to manufacture plaintiff's machine under the contract."

The facts recited do not support the Court's conclusion that by paragraph 11 appellee intended to forego the right which he otherwise had to recover damages from the Cutlers in the event of a suspension by them of their performance under the contract. If the Cutlers desired "to continue to manufacture plaintiff's machine under the contract", they were perfectly free to do so and their right to continue was assured to them if they had elected to refrain from selling their business. But the continuance of that right, dependent only upon matters entirely within their control, did not give them the right, as the Court concludes, to terminate the contract at their pleasure.

Further, on page 6, the Court says:

> ". . . The second option in paragraph 11 to the plaintiff permitted him to terminate the contract in case of such a sale of the Cutlers' business regardless of whether or not an arrangement could be made with the purchaser or of whether or not the Cutlers desired to continue under the contract."

Again, we point out that if the Cutlers had desired to continue under the contract, they could have done so

at their pleasure, and it was within their sole power to determine whether or not they should continue to enjoy privileges given to them under the contract. Only by their own voluntary act of selling their business and divesting themselves of the instrument essential to their continued performance, could appellee acquire any right to prevent the Cutlers from continuing under the contract. There is nothing in the fact as recited in the last quotation to indicate an intent of the parties, by any language in paragraph 11, to deprive appellee of the right which he would otherwise have to hold the Cutlers for damages if they chose to suspend performance of the contract.

Finally, on page 6, the Court says:

> ". . . While it is true that the contract did not expressly give the Cutlers the right to terminate the contract in the case of the sale of their business, it is manifest from the contract and the circumstances surrounding it, and particularly from the provisions of paragraph 11 thereof, that a sale by the Cutlers of their business would prevent their performance of the contract, and, consequently, to enforce the contract under the circumstances would be directly contrary to the obvious intention of the parties."

We respectfully submit that the conclusion thus announced does not follow from the premise stated in the beginning of the sentence. We reiterate that the matter of the sale by the Cutlers of their business was a thing entirely within their control and entirely

beyond the control of appellee. Manifestly the voluntary act of the Cutlers in selling their business would make performance of the contract by them impossible, but it does not follow that the parties intended, when they drafted the contract, that appellee should be foreclosed of his right to sue for damages if the Cutlers chose to disable themselves. It does not follow that the Cutlers had the right, to be exercised by them at their pleasure, to terminate the contract.

We submit that it tortures the language of paragraph 11 to say that by the grant of the option to appellee to cancel and terminate the contract, in certain circumstances, the parties thereby intended to grant to the Cutlers the right to terminate the contract at their pleasure. An option is exercisable by a party at his own election and he is thereby given a choice; but here the Court would say that the very grant to appellee of a right to make a choice destroyed his right to elect, and conferred on the Cutlers the right to terminate at their election and without appellee's consent.

The interpretation of the contract with paragraph 11 included gave to the appellee precisely the same rights which he would have had if paragraph 11 had been omitted. The obvious question to ask, then, is why it was included if paragraph 11 added nothing to the rights of any of the parties. With all defer-

ence to the opinion of the attorney, now deceased, who drafted paragraph 11 (Appellants' Brief, p. 35), we believe that appellee was poorly advised when he insisted on the inclusion of paragraph 11. That paragraph was undoubtedly superfluous. It neither added to nor subtracted from the rights which appellee would otherwise have had or the rights or obligations of the Cutlers. It is erroneous to hold, as the Court has, that the language insisted upon by appellee upon the advice of his then attorney, for the purpose of securing to appellee rights which he thought he would not otherwise have, actually evidences an intent on the part of the appellee and the appellants to take away from appellee the very rights he was endeavoring to protect. It is erroneous to conclude that a paragraph insisted on by appellee so that the Cutlers could not "shelve" him, evidences an intent to give the Cutlers a right to terminate the contract, and thus "shelve" appellee.

There is a further point which the Court has overlooked, and this again is the result of our failure to discuss in greater detail the provisions and circumstances of the particular agreement here involved. The additional point requires a consideration of paragraph 8 of the agreement. Paragraph 8 reads as follows:

> "EIGHTH. If either of the parties shall fail to keep and perform diligently and punctually, any of the terms and conditions hereof, the other

party shall have the right to cancel and terminate this agreement for such breach, provided that before such right of cancellation shall be exercised, the party asserting such breach and claiming such right of cancellation, shall give the other notice in writing specifying such breach with reasonable certainty, and the other party may within thirty days after receiving such notice, make good such breach. If the party receiving such notice shall fail within such period of thirty days to make good such breach, then the other party shall have the right to cancel and terminate this contract, but such cancellation shall not release the other party from any liabilities then existing hereunder."

It must be remembered that the decision of the Court, in its interpretation only of the language of paragraph 11, reads into the contract a right in the Cutlers to terminate the contract upon a sale of their business and to relieve themselves of any further obligations to appellee. It is a cardinal rule of interpretation that in determining the intent of the parties as expressed in a written instrument, a court will examine the entire instrument and determine the intent from the entire document, even though certain parts of the contract considered alone would seem to lead to a different conclusion. *Miller v. Robertson,* 266 U. S. 243, 45 S. Ct. 73; *Sasinowski v. Boston & M. R. R. Co.,* 74 F. (2d) 822. It is likewise a rule of interpretation of contracts that the enumeration of particular things indicates an intent

on the part of the parties to exclude things of the same nature not specifically enumerated. *Andrew Jergens Co. v. Woodbury, Inc.,* 273 Fed. 952 (afd. 279 Fed. 1016). This rule is expressed in the phrase *Expressio unius est exclusio alterius.* Consequently, to determine whether the Court is correct in its decision in reading into paragraph 11 a provision not there expressed, giving the Cutlers the right to terminate under the facts of this case, we must consider the entire contract, and particularly paragraph 8.

Paragraph 8 gives to each party the right to cancel and terminate the contract in the event of a breach by the other party. By this paragraph 8, then, the Cutlers were given a right to cancel and terminate the contract, but only in the event of a breach by the appellee of his obligations as set forth in the contract. Necessarily. then, if appellee was not in any way in default when the Cutlers attempted to terminate the contract in the spring of 1930, they had no right to terminate by virtue of any provision in paragraph 8. Furthermore, the specification in paragraph 8 of the condition upon which the Cutlers would have the right to cancel and terminate the agreement, under the rule that the expression of one is the exclusion of the other, negatives the conclusion of the Court that the Cutlers had the right to terminate the contract for any reasons other than those expressed in paragraph 8. It follows, then,

that the decision of the Court, in reading into the contract a right in the Cutlers to terminate at their pleasure upon a sale of their business—a ground not specified in paragraph 8—is an erroneous construction of the contract.

We respectfully submit that a consideration only of the language of the contract itself and of the circumstances surrounding its preparation and execution requires the conclusion that nothing in the contract deprived appellee of his right, in the event of a sale by the Cutlers of their business and a suspension of performance by them, to treat the contract as still in effect and to hold the Cutlers for damages arising out of their breach. The decision of the Court is erroneous in reading into paragraph 11 a right in the Cutlers, not there expressed, to terminate the contract at their pleasure, upon the sale of their business, and in depriving appellee of the right which every promisee has, whether or not expressed in the contract, to hold the promisor liable for damages in the event of a breach by the promisor. These conclusions, we submit, follow from a consideration only of paragraph 11 and the circumstances under which it was prepared. These conclusions are strengthened by a consideration of the contract as a whole, and particularly of paragraph 8.

IV.

The Authorities Are Opposed to the Conclusions Announced By the Court In Its Decision.

In our brief we cited two decisions of the Supreme Court of the United States and one decision of the Circuit Court of Appeals for the Sixth Circuit, construing language similar to that contained in paragraph 11 of the contract now under consideration. In the present case, paragraph 11 provides that upon the sale by the Cutlers of their business, appellee "shall have the option" either to require the purchaser to assume the contract or to cancel and terminate the agreement. We asserted in our brief that the rights thus given, specifically described as optional, were not the exclusive remedies of appellee. We contended that if he could not negotiate a novation with the purchaser, he might waive his right to terminate the contract and treat the contract as still in effect and sue to recover damages. Since the optional rights were inserted for his benefit (and we think that it has been demonstrated by the testimony reviewed in prior pages that they were inserted for his benefit), he could waive them and still sue and recover damages in the event of a default.

This conclusion is supported by the decisions of the Supreme Court previously cited construing language much less liberal to the plaintiffs than the

language here under consideration. *Stewart v. Griffith,* 217 U. S. 323, 30 S. Ct. 528; *Western Union Telegraph Company v. Brown,* 253 U. S. 101, 40 S. Ct. 460. We likewise cited *Kant-Skore Piston Company v. Sinclair Manufacturing Corporation,* 32 F. (2d) 882, a decision of the Sixth Circuit Court of Appeals, which applies the same rule announced by the Supreme Court in its two decisions. In appellants' brief counsel cited no authority to the contrary and made no attempt to distinguish the cases cited and relied on by us. This avoidance by counsel of any discussion of the authorities is particularly noticeable in view of the fact that these were the three cases cited and relied on by the Master in reaching his conclusions. (R. pp. 769-770).

The Court in its decision takes no notice of these controlling decisions of the United States Supreme Court, and, as a matter of fact, cites absolutely no authority to support its views.

The rule of these cases is the uniform rule of all the Circuits wherein the point has arisen. The Circuit Court of Appeals of the First Circuit applied the rule of the Supreme Court cases in *Fred W. Mears Heel Co. v. Walley,* 71 F. (2d) 876. The Circuit Court of Appeals of the Third Circuit applied the same rule in *Biscayne Shores, Inc., v. Cook,* 67 F. (2d) 144, and likewise in *Burns Mortgage Co. v.*

Schwartz, 72 F. (2d) 991. In the Fourth Circuit the rule was applied in *First National Bank v. Glens Falls Insurance Co.,* 27 F. (2d) 64. As we have already pointed out, the rule was applied in the Sixth Circuit in *Kant-Skore Piston Company v. Sinclair Mfg. Corporation, supra.* In the Seventh Circuit, the court considered the rule in *Interstate Iron & Steel Co. v. Northwestern Bridge & Iron Co.,* 278 Fed. 50. In that case the court reached a conclusion contrary to that in *Stewart v. Griffith* because of the finding that the clause in question was not inserted clearly for the benefit of the plaintiff. The court indicated that the result of the case would have been otherwise and that the rule of *Stewart v. Griffith* would have been applicable had the provision in the contract then under consideration relating to cancellation privileges been described as "optional" in the plaintiff. Since the rights granted by paragraph 11 in this case were described as "optional", it follows that the rule in the Seventh Circuit is in accord with the decision we now urge. In the Eighth Circuit, the rule is applied in two cases, in *James B. Berry & Sons Co. v. Monark Gasoline & Oil Co.,* 32 F. (2d) 74, and *Moffat Tunnel Improvement Dist. v. Denver & Salt Lake R. Co.,* 45 F. (2d) 715.

So far as we have been able to determine, the point has been before the court in the Ninth Circuit

in only one case—*Western Union Telegraph Co. v. Lange,* 248 Fed. 656. In that case this Court attempted to distinguish *Stewart v. Griffith,* and declined to apply the rule therein announced by the Supreme Court of the United States. However, that decision in the Ninth Circuit was reversed by the Supreme Court of the United States in *Western Union Telegraph Co. v. Brown, supra,* the case upon which the Master relied and which we cited in our opening brief.

There is some suggestion in the cases that the rule of *Stewart v. Griffith* applies only to contracts involving the sale or leasing of real estate. This was the suggestion made by the Circuit Court of Appeals of this Circuit in *Western Union Telegraph Co. v. Lange, supra,* and a similar suggestion is made in *Sedalia Mining & Mineral Co. v. Sharp,* 300 Fed. 211, a decision of the District Court of Kansas. This suggestion is effectively answered by the decision of the Supreme Court in *Western Union Telegraph Co. v. Brown, supra,* which involved a contract for the sale of corporate stock, and which reversed the decision of this Circuit wherein the suggestion was made. It is likewise answered by the case of *Fred W. Mears Heel Co. v. Walley, supra,* from the First Circuit, involving a contract for the sale of lumber; the case of *Kant-Skore Piston Co. v. Sinclair Mfg. Corporation, supra,* from the Sixth Cir-

cuit involving, as does the case at bar, a contract for license to manufacture under a patent; and *James B. Berry & Sons v. Monark Gasoline & Oil Co.* from the Eighth Circuit, involving a contract for the sale of gasoline.

In conclusion we earnestly submit that the contract in this case prescribed a period of time during which both of the contracting parties were bound to perform. In addition to this, paragraph 11 undertook to give to appellee the right to terminate the contract in the event appellants sold their business to a third party. The result of the Court's decision is to give to appellants the real option to terminate, because the Court has concluded that upon the sale by appellants the contract came to an end. We have searched the contract, the evidence disclosing the intention of the parties, and the applicable decisions, in vain, for anything which would support this result. We earnestly believe that upon a further consideration of the record the Court will reach a different conclusion than that announced in its decision.

We submit that the case should be re-examined and re-heard.

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